[2011] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 5/2011

BETWEEN	**INSURANCE COMPANY OF THE WEST INDIES LTD**	**APPELLANT/INTERVENER**
A N D	**SHELTON ALLEN (Administrator of the Estate of Harland Allen)**	**1ST RESPONDENT**
A N D	**MERVIS NASH**	**2ND RESPONDENT**
A N D	**DELAN WATSON**	**3RD RESPONDENT**
A N D	**NICHON LAING**	**4TH RESPONDENT**

Miss Camille Wignall and Miss Arlene Williams instructed by Nunes Scholefield Deleon & Co for the appellant

Jermaine Simms and Colin Alcott instructed by Marion Rose-Green for the 1st respondent

12 April and 11 October 2011

PROCEDURAL APPEAL

MORRISON JA

Introduction

[1] The 1st respondent is the administrator of the estate of the late Harland Allen, who died on 28 April 2005 as a result of a motor vehicle accident along the Free Hill

Main Road in the parish of St Mary. On the day in question, a motor vehicle owned and driven by the 2rd respondent, came into collision with a motor vehicle owned by the 3rd respondent and driven by the 4th respondent ('the said vehicle') and thereafter with the late Mr Allen, who was at the time a pedestrian on the sidewalk of the said road.

[2] Proceedings were in due course commenced against the respondents by the 1st respondent as the personal representative of the late Mr Allen. On 9 March 2010, on the *ex parte* application of the 1st respondent, Master Simmons ordered, among other things, that personal service of the claim on the 3rd respondent should be dispensed with and that service should instead be effected on the appellant, as insurer of the 3rd respondent. Pursuant to this order, the appellant was duly served on 19 March 2010.

[3] By notice of application for court orders filed on 19 May 2010, the appellant applied for an extension of time within which to make an application to set aside Master Simmons' *ex parte* order and service of the claim form on it pursuant to that order. In substance, the grounds of this application were that (a) the 3rd respondent was in breach of the named driver policy of insurance and was therefore not entitled to an indemnity under the policy, a fact which, although it was known to the 1st respondent before he applied for and obtained the order for substituted service, was not disclosed by him to the court; and (b) steps taken by the appellant to locate the 3rd respondent had proved to be futile.

[4] On 13 January 2011, Master George (Ag) made an order extending the time as prayed, but refused to set aside Master Simmons' *ex parte* order or service on the

appellant. This is therefore an appeal (pursuant to leave granted by the learned Master) from that decision and in it the appellant relies on the following grounds of appeal:

> "a. The learned judge erred as a matter of fact and/or law in failing to consider that the 1st Respondent/Claimant had failed on an ex parte application to make full and frank disclosure of the fact that the Appellant/Intervener had advised the 1st Respondent/Claimant that the 3rd Respondent/2nd Defendant was in breach of the policy and that it would not be granting indemnity.
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> b. The learned judge erred as a matter of fact and/or law in finding that service on the Appellant/Intervener would enable the 3rd Respondent/Defendant to ascertain the contents of the Claim Form and Particulars of Claim.
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> c. The learned judge erred as a matter of fact and/or law in failing to consider that as the steps taken by the Appellant/ Intervener to locate the 3rd Respondent/Defendant have proven futile, the 3rd Respondent/Defendant would not be able to ascertain the contents of the Claim Form and the Particulars of Claim.
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> d. The learned judge erred as a matter of fact and/or law in failing to consider that in light of the breach of the policy the Appellant/Intervener was no longer bound to honour the policy of insurance and would therefore no longer exercise any right of subrogation under the policy and would not be compelled to be in contact with the 3rd Respondent/2nd Defendant.
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> e. The learned judge erred as a matter of fact and/or law in finding that at the time of the accident there was a contract of insurance between the Appellant/Intervener and the 3rd Respondent/Defendant."

The facts

[5] Before going to counsel's submissions in support of these grounds, it may be helpful to refer briefly to the facts upon which the appellant relied in its application to

set aside the *ex parte* order. Miss Suzette Radlein, the appellant's legal counsel, in affidavits sworn to on 18 May 2010 and 18 November 2010, stated as follows. The appellant was at all material times the insurer of the said vehicle, in respect of which the 3rd respondent had completed a proposal form, which was incorporated into the contract of insurance, in which he had stated that he would be the only driver of the said vehicle. A few months after the accident in which the late Mr Allen was killed, the appellant received information about it, including that at the material time the said vehicle was being driven by the 4th respondent, who was not named and/or authorised to drive the said vehicle. By letter dated 2 November 2005, the appellant advised the 3rd respondent that he was in breach of the policy of insurance and that no indemnity would therefore be granted to him in respect of any loss arising out of the accident. Further, also in breach of the policy, the 3rd respondent did not report the accident to the appellant. Some three and a half years later, the appellant received notice of the 1st respondent's action against the 3rd and 4th respondents and, by letter dated 4 June 2009, advised the 1st respondent's attorneys-at-law that the 3rd respondent had breached his policy of insurance and would not therefore be offered an indemnity in respect of any loss arising from the said accident. Despite having written to the 3rd respondent, the appellant had heard nothing from him and all its efforts to locate him at his last known address had been unsuccessful. In any event, the 3rd respondent's policy of insurance had not been renewed upon its expiry in February 2006 and the appellant therefore had no current contractual relationship with him and no knowledge

of his present whereabouts. As a result, the appellant would be unable to accept service of any documents on behalf of the 3rd respondent.

Submissions

[6] On ground one, Miss Wignall for the appellant submitted that the learned Master had erred in failing to consider that the 1st respondent had failed on the *ex parte* application to make full and frank disclosure of all the facts to Master Simmons, in particular the fact that the 3rd respondent was in breach of the policy of insurance and that the appellant would accordingly not be granting him any immunity. Thus, on the authority of ***R v Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac*** [1917] 1 KB 486 and ***Pearson Education Limited v Prentice Hall of India Private Limited*** [2005] EWHC 655 (QB), Miss Wignall submitted that the 3rd respondent ought not to be allowed to obtain any advantage by virtue of his failure to make full disclosure and that the Master's order should therefore be set aside. Mr Simms for the 1st respondent did not challenge the principle, but submitted that even if the learned Master had been aware of the fact that there had been a breach of the policy in respect of the named driver stipulation, that would not have been a relevant consideration and she would have come to the same decision in any event.

[7] Taking grounds two and three together, Miss Wignall contended that the Master had failed to have regard to rule 5.13 of the Civil Procedure Rules 2002 ('the CPR'), which required an applicant for permission to serve process by a method other than personal service to show that the method of service proposed "is likely to enable the

person to be served to ascertain the contents of the claim form and particulars of claim". This reflected the long established principle that a defendant must be notified of proceedings which have been brought against him (***Porter v Freudenberg*** [1915] 1 KB 857). In coming to her decision, the Master had (wrongly) placed great reliance on the decisions at first instance of Mangatal J (Ag) (as she then was), in ***Lincoln Watson v Paula Nelson*** (Suit No. CL 2002/W-062) and Sykes J, in ***Egon Baker v Novelette Malcolm and Another*** (Suit No. CL 1999/B055), both of which were decided under the provisions of the Judicature (Civil Procedure Code) Act ('the CPC'), in respect of which different considerations are applicable on an application for substituted service. English cases such as ***Gurtner v Circuit and Another*** [1968] 1 All ER 328 and ***Abbey National plc v Frost (Solicitors' Indemnity Fund Ltd intervening)*** [1999] 2 All ER 206, upon which the 3rd respondent relied, were also decided under the old rules in England.

[8] Mr Simms for his part supported Master George's ruling, on the basis that she was right to place reliance on ***Lincoln Watson*** and ***Egon Baker***, which were still good law in respect of the post CPR era, as also were ***Gurtner v Circuit*** and older cases dealing with service of process on insurance companies in road traffic cases.

[9] Taking grounds four and five together, Miss Wignall submitted that by reason of the 3rd respondent's breach at the time of the fatal accident of the named driver provision in the policy, the appellant was no longer bound to honour the policy since the said vehicle was not covered when being driven by the 4th respondent. Once the

said vehicle was used for a purpose not permitted by the policy, then it was not insured (***The Administrator General v National Employers' Mutual Association Ltd*** (1988) 25 JLR 459 and ***Bank of Nova Scotia Ltd v Hellenic Mutual War Risks Association (Bermuda) Ltd (The 'Good Luck')*** [1992] 1 AC 233). Mr Simms on the other hand contended that, although a breach of warranty will discharge the insurer from liability, it does not discharge the contract, which will "continue in force until the end of the policy".

Discussion

Non disclosure/misrepresentation

[10] ***R v Kensington Income Tax Commissioners*** is well known for the principle that the applicant on an *ex parte* application is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge. If he does not make that fullest possible disclosure, or was otherwise lacking in candour in the manner of his application, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may already have obtained by means of the order wrongly obtained by him (see per Warrington LJ at 509). Thus, it is the duty of the applicant to "state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it had taken on the faith of the imperfect statement" (per Scrutton LJ at page 514).

[11] However, it is also clear from the authorities that it is not for every omission that the previous order will automatically be discharged. As Lord Denning MR put it in ***Bank Mellat v Nikpour*** [1985] F.S.R. 87, 90, "A *locus poenitentiae* may sometimes be afforded" and the court therefore has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, to continue the order, or to make a new order on terms (see ***Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc*** [1988] 3 All ER 178, per Glidewell LJ, at page 183 and ***Brinks-MAT Ltd v Elcombe*** [1988] 3 All ER 188, per Ralph Gibson LJ, at 192-3).

Substituted/Alternative method of service

[12] Turning now to the question of service, in ***Porter v Freudenberg,*** Lord Reading CJ considered (at page 887), delivering the judgment of an exceptionally strong Court of Appeal (Lord Reading CJ, Lord Cozens-Hardy MR, Buckley, Kennedy, Swinfen Eady, Phillimore and Pickford LJJ), that it was a fundamental principle of English law that a defendant (even, as in that case, one who was an alien enemy) was "entitled to effective notice of the proceedings against him". Thus, for substituted service to 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 come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted" (page 888). Once this is shown, the court "may then make such order as may seem just", applying Order IX, r.2, the terms of which "are of very wide application, and give a very wide discretion which we are not inclined to limit". Language in similarly ample terms was also to be found in the CPC, section 35 of which provided that, if the

plaintiff "is from any cause unable promptly to effect [personal] service...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". Section 44 provided that every application for an order for substituted service was required to be supported by an affidavit setting out the grounds upon which the application was made.

[13] In ***Lincoln Watson,*** Mangatal J (Ag) was concerned with an insurer's application to set aside an order for substituted service on its insured by serving the insurer. The application was made on the grounds that, firstly, the insurer was unaware of its insured's whereabouts and had therefore been unable to bring the proceedings to her attention and, secondly, the insured may have been residing outside of the jurisdiction at the time the order was made and the order was therefore irregular and improper. There is no question that, as Mangatal J (Ag) held, this application fell for consideration under the old rules.

[14] In a characteristically careful judgment, Mangatal J (Ag) referred to a number of English cases in which the efficacy of orders for substituted service made in the context of the insurer/insured relationship was considered. In ***Murfin v Ashbridge and Martin*** [1941] 1 All ER 231, the plaintiff was injured when the motor cycle on which he was the pillion passenger was involved in a collision with a motor car driven by the defendant. When the defendant proved difficult to locate, an order was made for substituted service of the writ upon him by advertisement in a newspaper. However, that order was never acted upon, as a conditional appearance (which in due course

became unconditional) was entered on the defendant's behalf by solicitors acting on the instructions of the group of his insurers. (The insurers had acted in pursuance of the ordinary clause in the policy entitling their solicitors to conduct the whole litigation on behalf of the insured.) At this point, there then arose what Sir Wilfred Greene MR, who delivered the leading judgment when the matter finally reached the Court of Appeal, described (at page 233) as "the beginning of the misunderstandings which have led to the complications in this case". The upshot of it all was that certain interlocutory proceedings, which ultimately gave rise to the appeal, were then taken in the name of the insurers, who were not themselves parties to the action. The Court of Appeal (Sir Wilfred Greene MR, Goddard and Du Parcq LJJ) held that, although the insurers had control of the proceedings and could by virtue of that fact take any step in the action in the name of the defendant, they were not parties to the action and therefore had no *locus standi* to make any application or to appeal in their own names. The appeal was accordingly struck out and an order for costs made against the insurers' solicitors personally.

[15] In a brief concurring judgment, Goddard LJ made this observation (at page 235):

> "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."

[16] In ***Gurtner v Circuit,*** the primary issue was whether the Motor Insurers' Bureau (the 'MIB') should be added as a defendant, on its application, in an action for damages for injuries resulting from a motor vehicle accident. It was held by the Court of Appeal (Lord Denning MR, Diplock and Salmon LJJ) that the MIB should be so added. Lord Denning MR then went on to express the view (at pages 332-3) that an order made in the court below for substituted service on the original defendant by service on Royal Insurance Co., Ltd, an insurance company with which he had no connection, should be set aside, on the ground that, "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". But it would be different, Lord Denning MR observed further (at page 333), "if the defendant were insured with Royal Insurance Co., Ltd". Diplock LJ also considered (at page 338) that the order for substituted service at the address of the Royal Insurance Co., Ltd was "obviously wrong", as there "was no possible reason for serving the defendant" at that address, but left open the possibility that an order for substituted service, "might properly be made on the defendant at the address of the [MIB]". Salmon LJ agreed with both judgments.

[17] In the subsequent case of ***Clarke v Vedel*** [1979] RTR 26, the Court of Appeal (Stephenson and Roskill LJJ) considered the effect of note 65/4/6 to RSC Ord 65, r. 4 in the Supreme Court Practice 1976, which was explicitly based on ***Murfin v Ashbridge*** and ***Gurtner v Circuit***. The note stated (uncontroversially, in the light of the clear language of the rule itself) that in personal injury actions arising out of road accidents,

if the defendant cannot be traced, affidavit evidence must show that all reasonable efforts have been made to trace him and to effect personal service of the writ of summons on him. Once the Master was satisfied as to this, the note continued –

> "...then (1) in cases where the defendant is insured and the identity of his insurers is known, the master may make an order for substituted service on the defendant at the address of the insurer...and (2) in cases where the [MIB] will be liable to pay the damages, if any, awarded to the plaintiff, as where the defendant was not insured against third party risks, or if the identity of his insurers is not known, or if his insurers have repudiated liability under the policy, the master may make an order for substituted service on the defendant at the address of the [MIB] (see Gurtner v Circuit supra)."

[18] Counsel for the plaintiff in ***Clarke v Vedel*** conceded that, on the facts of the case, there was no likelihood that the writ would have come to the attention of the defendant as a result of an order for substituted service on him at the address of the MIB and in those circumstances it was held (applying ***Porter v Freudenberg***) that the judge in the court below had been right to set aside the order for substituted service on the MIB which had been previously made by the Master.

[19] Both Stephenson and Roskill LJJ considered the effect of the decisions of the court in ***Murfin v Ashbridge*** and ***Gurtner v Circuit***. As regards Goddard LJ's remark in ***Murfin v Ashbridge*** (para. [15] above), Stephenson LJ observed pointedly (at page 33) that "[it] was *obiter*, it was tentatively expressed and it was limited to that state of affairs". Further, he doubted whether Goddard LJ "would have wished to be taken to have intended any formulation of a general rule by that observation". As for ***Gurtner v***

Circuit, Stephenson LJ pointed out (at page 35) that "the question whether the Bureau should be joined was the main point", and went on to say this:

> "...the first thing that strikes one about the judgment of Lord Denning MR is that he is declaring that the affidavit in support of the application for substituted service was inadequate 'to warrant the order, for the simple reason that it did not show that the writ was likely to reach the defendant, nor come to his knowledge'. Lord Denning MR was there reaffirming and following the *Porter v Freudenberg*...principle of all substituted service...It is a substitute for personal service and the object of it is to bring the important document served – in this case the writ - to the notice of the defendant so that he may defend the action if he wishes."

[20] Stephenson LJ then said this (at page 36):

> "For my part, I do find some difficulty in reconciling the general rule that substituted service should only be ordered where there was 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**..., 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 [MIB] in a road accident case. The existence of insurers and of the [MIB] and of those various agreements does create a special position which enables a plaintiff to avoid the strictness of the general rule and obtain such an order for substituted service in some cases. But I am not satisfied that that exception is as wide as the proposition laid down in the Supreme Court Practice 1976, and I am not satisfied that it applies to this case."

[21] In a brief concurrence, Roskill LJ observed (at page 38) that the submissions made on behalf of the plaintiff demonstrated "the danger of taking dicta in judgments which have to be related to the facts of the particular case before the court and then

seeking to elevate those dicta into comprehensive statements of law". He therefore doubted that what had been said by the judges in those cases had been intended to create an exception to "the basic principle upon which the court gives leave to effect substituted service", which is to say, the principle laid down by the court in ***Porter v Freudenberg***. "How, then, can it be said", Roskill LJ asked rhetorically (at page 39), "that that principle has been in some way whittled down so as to permit substituted service in a case such as the present where...it is plain that this particular mode of substituted service could not possibly bring the existence of these proceedings to his notice?" He accordingly considered, like Stephenson LJ, that note 64/5/6 was "too widely stated if it is intended to suggest that it is proper in every case where the [MIB] may be involved to make an order for substituted service on the intended defendant at the address of the [MIB]".

[22] Mangatal J (Ag) referred finally to ***Abbey National***. The question in that case was whether an order that substituted service of a claim against a solicitor by a former client should be made on the Solicitors' Indemnity Fund ('the SIF') was properly made. The judge in the court below had determined that such an order ought not to have been granted under the then applicable rule (RSC Ord 65, r. 4(1)) unless it was shown that it was likely that the order for substituted service would bring the document to the notice of the person being served. The Court of Appeal (Nourse, Henry and Robert Walker LJJ) held that the court's discretion to order substituted service was not subject to an invariable requirement that the order would be likely to bring the document to the attention of the person being served. Accordingly, this was a suitable case for an order

for substituted service on the solicitor to be made by service on the SIF, given the fund's role in protecting the public in such cases. Nourse LJ was however careful to emphasise (at page 217), "that substituted service on the SIF can only be ordered in what the master referred to as suitable cases. There will always be a discretion to refuse such an order on grounds so various that an attempt to enumerate them would be pointless".

[23] In his judgment (with which the other members of the court agreed), Nourse LJ considered the history of the relevant rule, pointing out that the requirement that it needed to be shown on an application for substituted service, as a precondition of the making of an order that by that means it was likely that the documents would come to the attention of the defendant was not originally part of the rule itself (at any rate in 1915, when ***Porter v Freudenberg*** was decided). The text of the rule (then Ord 9, r. 2) imposed only one precondition, which was that the plaintiff should have been unable to effect prompt personal service, but there was a second precondition "derived only from a principle of discretion adopted by the King's Bench masters" (per Nourse LJ at page 213). However, when the rules were revised in 1962, that principle of discretion was incorporated into the rule itself (becoming in due course Ord 65, r. 4(3)), though, as the court held in ***Abbey National***, the revised rule did not cut down the generality of the discretion to order substituted service in suitable cases by making the principle of discretion a precondition for the making of such an order. Rather, the new wording was "intended to provide for what will no doubt constitute the majority of orders for substituted service" (per Nourse LJ at page 213).

[24] Based on her review of these cases on the power of the court to order substituted service under rules *in pari materia* with the CPC as regards substituted service, Mangatal J (Ag) concluded as follows:

> "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 insurer. 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 Vehicles Insurance (Third Party Risks) Act."

[25] On this basis, Mangatal J (Ag) therefore dismissed the insurer's application to set aside the order for substituted service.

[26] ***Egon Baker*** was a case dealing with the identical issue which Mangatal J (Ag) had considered in ***Lincoln Watson***, save that it fell for consideration under the provisions of the CPR, and not of the CPC. This, it was submitted on behalf of the

insurer, was a crucial distinction between the two cases, because under rule 5.13(3) of the CPR, if the claimant has chosen to serve the claim form other than by personal service, he is required to show that it is likely that the claim form would be brought to the attention of the defendant. Sykes J rejected this submission, observing (at para. 4) that it "misses the point that a special rule has emerged in respect of motor vehicle insurers...[which] stems from the relationship between the insurer and the insured". Basing himself squarely on Mangatal J's (Ag) judgment in ***Lincoln Watson***, Sykes J stated the position in this way:

> "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 [sic] 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 [sic] 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."

[27] Neither Mangatal J (Ag) nor Sykes J appears to have been referred to the judgment of Judge Peter Baker QC at first instance in ***Lennon v Tunstall*** 1999 WL

33114342, to which we were referred by Miss Wignall. That was a road accident case in which, on an appeal from an order for substituted service on the defendant's insurer, the court treated the pre-CPR rules as applicable. It was accepted by counsel for the plaintiff in that case that the method of substituted service proposed could not possibly bring the writ to the defendant's notice.

[28] Judge Baker QC took the two tests laid down (by what he described - at page 4 - as "a formidable court, consisting...of no less than seven judges") in ***Porter v Freudenberg*** as his starting point. With respect to the second limb of the rule in that case, that is, whether the method of substituted service proposed was one which would in reasonable probability result in the writ being brought to the attention of the defendant, he considered that, although it was of general application, there were "clear-cut exceptions", one of which was ***Abbey National***. That was a case, the judge observed, "rather specially, based on considerations of public policy because there the matter for consideration was the [SIF] as created by the Solicitors Act 1974 and does not help this plaintiff". As regards the ***Murfin v Ashbridge*** line of cases, Judge Baker QC expressed serious reservations as to whether those cases described a true exception to the ***Porter v Freudenberg*** principle, referring with obvious approval to the views expressed on the point by both Stephenson and Roskill LJJ in ***Clarke v Vedel*** (see paras [20] and [21] above). In the result, the learned judge allowed an appeal from the order for substituted service made in the court below.

[29] I too have to confess, with the greatest of respect to both learned judges, to a number of misgivings about the generality of Mangatal J's (Ag), unqualified statement (para. [24] above) that the cases "support the position that the motorist's insurer is a proper party to be served by way of substitution", as well as Sykes J's characterisation of that principle (at para. [26]), as a "special rule" governing service of process in road traffic cases. In the first place, it seems clear that neither ***Murfin v Ashbridge*** nor ***Gurtner v Circuit***, is authority for a statement in such broad terms, this issue not having been directly before the court in either case and the remarks of all the judges who commented on it having been entirely *obiter.* Secondly, it is clear that in ***Gurtner v Circuit***, the explicit basis of the court's conclusion that the order for substituted service had been wrongly made was the fact that, as Lord Denning MR put it (see para. [16]) above), the affidavit in support of the application "did not show that the writ was likely to reach the defendant, nor to come to his knowledge". Thirdly, in ***Clarke v Vedel***, which is the only authority referred to that could in terms be said to support the existence of any such principle, it is clear that Stephenson LJ regarded this as an exception to what he described (at page 36) as "the general rule", which was 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". He was accordingly careful to describe the limited exception which he acknowledged in the most guarded terms ("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 [MIB] in a road

accident case"). Fourthly, ***Abbey National***, which is the only authority referred to by Mangatal J (Ag) which lends unqualified support to the proposition that there was no requirement under the old rules to show as a precondition to an order for substituted service that the order would be likely to bring the document to the notice of the person being served, was not a road accident case at all. (Much obviously turned in that case on the role and responsibility of the SIF in relation to errant solicitors.) And lastly, while the Motor Vehicles Insurance (Third Party Risks) Act does provide a mechanism for the recovery of damages awarded against insured persons directly from the insurer, provided that the insurer had the required notice of the proceedings (section 18), this is only possible where a judgment has been obtained against the insured person, who for that purpose must necessarily have been served with the originating process, either personally or by way of substitution.

[30] ***Gurtner v Circuit*** is in my view authority only for saying that the MIB may properly be allowed to intervene where the defendant in a personal injuries case arising out of a motor vehicle accident is either uninsured or untraceable. But there is, of course, no equivalent in Jamaica of the MIB arrangements in the United Kingdom, which create a mechanism for the recovery of damages directly from insurers in cases of uninsured drivers and drivers who cannot be traced for the purpose of service (as to which, see Blackstone's Civil Practice 2010, paras 9.2 – 9.6). The case is certainly not authority, it seems to me, for the unqualified statement in support of which it is cited by Mr Stuart Simes in his work, A Practical Approach to Civil Procedure (10th edn, para. 8.37), that "in road traffic cases, provided the claimant shows that all reasonable steps

have been taken to trace the driver, service by an alternative method may be allowed at the address of the **driver's insurers** or the MIB" (emphasis mine).

[31] In ***Lincoln Watson***, Mangatal J (Ag) was solely concerned with the provisions of the CPC. But, as has been seen, in ***Egon Baker*** Sykes J extended the principle of her judgment to a case falling squarely under the CPR. At the core of Miss Wignall's submissions is the proposition that the requirements of the old rules and the CPR are materially different, in that while, under the old rules, the court enjoyed a wide discretion whether or not to order substituted service, under the CPR, that discretion is circumscribed by the fact that the court must be satisfied that the method of service chosen will be sufficient to enable the defendant to ascertain the contents of the claim. This, Miss Wignall submitted, is the fundamental distinction that Master George failed to appreciate in the instant case by applying the decisions in ***Lincoln Watson*** and ***Egon Baker***.

[32] Although, as Miss Wignall pointed out, the CPR does not refer in so many words to substituted service, the concept is in essence captured in rule 5.13, under the rubric "Alternative methods of service". It may at this stage be helpful to set out the full text of the rule (emphases in the body of the rule supplied):

> "**Alternative methods of service**
>
> 5.13 (1) Instead of personal service a party may choose an alternative method of service.
>
> (2) Where a party –

(a) chooses an alternative method of service; and

(b) the court is asked to take any step on the basis that the claim form has been served,

the party who served 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;**

(c) **state the time when the person served was or was likely to have been in a position to ascertain the contents of the documents; and**

(d) **exhibit a copy of the documents served.**

(4) The registry must immediately refer any affidavit filed under paragraph (2) to a judge, master or registrar who must -

(a) consider the evidence; and

(b) endorse on the affidavit whether it satisfactorily proves service.

(5) **Where the court is satisfied that the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form**, the registry must fix a date, time and place to consider making an order under rule 5.14 and give at least 7 days notice to the claimant.

(6) An endorsement made pursuant to 5.13(4) may be set aside on good cause being shown."

[33] It will be seen that, while personal service remains the primary method of service (rule 5.1(1)), provision is also made for "an alternative method of service", at the option of a party who so chooses (rule 5.13(1)). Where a party chooses an alternative method of service and the court is thereafter asked to take any step on the basis that the claim form has been served, that party 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" (rule 5.13(2)). The required affidavit of service must not only give details of the method of service used, but must also show either 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 (rule 5.13(3)(b)). Once filed, this affidavit must immediately be referred by the registry to a judge, master or registrar, who must consider the evidence provided and endorse on the affidavit "whether it satisfactorily proves service" (rule 5.13(4)). (Such an endorsement may be set aside "on good cause being shown" - rule 5.13(6)). If the court is not satisfied that "the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form", then the registry will fix a date for consideration of the making of an order under rule 5.14 (rule 5.13(5)).

[34] Rule 5.14 supplements rule 5.13, by providing that "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" (rule 5.14(1)). An application for such an order must be supported by an affidavit showing that the method of service proposed "is likely to enable the person to

be served to ascertain the contents of the claim form and particulars of claim" (rule 5.14(2)(b)).

[35] The plethora of references in rule 5.13 to the need for evidence of the likelihood of the claim form coming to the attention of the defendant by the claimant's choice of an alternative method of service seems to me to be a clear indication that the framers of the rule intended thereby to subject the option given to the claimant to the tightest possible control. Whatever may have been the history of the requirement under the pre-CPR rules and practice as regards the question of the likelihood of the substituted method of service bringing the documents to the notice of the defendant, it appears to me from the language of rule 5.13 to be unarguably clear that the option given by the rule to the claimant to choose an alternative method of service is expressly subject to the claimant being able to satisfy the court on affidavit, either that the defendant was in fact "able to ascertain the contents of the documents" (rule 5.13(3)(b)(i)), or that "it is likely that he or she would have been able to do so" (rule 5.13(3)(b)(ii)).

[36] Before leaving the actual text of rule 5.13, I should observe in passing that the 1st respondent chose to proceed in this case by way of an application to the Master for permission to serve the 3rd respondent by service upon the appellant as an alternative to personal service. No point appears to have been taken by anyone about this procedure before the Master and none was taken during the course of the hearing of the appeal before me. However, it strikes me that parties may wish to bear in mind when considering the question of alternative methods of service that rule 5.13, unlike

the English CPR rule 6.8, which requires a prior application to the court for permission to adopt an alternative method of service (see the Civil Court Service 2002), gives the option to the claimant to adopt such a method without any prior application, subject only to the affidavit of service filed subsequently satisfying the court that the method of service chosen by the claimant was sufficient to enable the defendant to ascertain the contents of the claim form. It is only when the court is not so satisfied that it will become necessary for an application to be made to the court under rule 5.14 for an order for service by a specified method.

[37] In his, as always, articulate and clear judgment in ***Egon Baker,*** Sykes J was of the view (at para. 4) that "the necessary outcome of [the insurer's] 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". It seems to me that the rules do in fact make that an inevitable conclusion, as Sykes J may himself have found it to be had it not been for his reliance on the so-called "special rule". Even if I am wrong in thinking that the authorities do not support the existence of such a rule (see paras [25] and [26] above), I consider it (in agreement with Miss Wignall) to have been expressly overridden by the clear intention of the framers of rule 5.13 of the CPR that the principle articulated in ***Porter v Freudenberg*** and applied by the King's Bench masters over the years following that decision should apply. That is, that in order for the court to sanction an alternative method of service 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.

Effect of a breach of policy terms on insurer's liability

[38] Miss Wignall referred me to the decision of this court in ***Administrator General v NEM Ltd***, and of the House of Lords in ***Bank of Nova Scotia v Hellenic Mutual War Risks Association Ltd***. In the former case, this court held, it seems to me uncontroversially, that if the use to which a vehicle is put "is contrary to the contract of insurance between insured and insurer, then...its user is outside the scope of the policy, and the vehicle is therefore not insured for that particular user" (per Forte JA, as he then was, at page 463). I do not propose to dwell on the latter case, which was primarily concerned with the effect of a breach of a promissory warranty under a particular provision of the Marine Insurance Act 1906 and the proper interpretation of the policy of marine insurance in question in the litigation between insurer and insured.

Disposal of the appeal

Ground one

[39] The appellant's complaint on this ground is that the judge erred in not considering the effect on the *ex parte* order for substituted service obtained by the 1st respondent of the failure to disclose that the appellant had advised the 1st respondent that the 3rd respondent was in breach of the policy of insurance, as a result of which the appellant would not be granting an indemnity in respect of the claim. There is no dispute that the relevant principles are as set out at paras [10] and [11] above, but Mr

Simms submitted that even if the learned Master had been aware of the fact that there had been a breach of the policy in respect of the named driver stipulation, that would not have been a relevant consideration and she would have come to the same decision in any event.

[40] Although I have unfortunately not had the benefit of Master Simmons' reasons for her order, it is common ground that she placed reliance on and followed the decisions in ***Lincoln Watson*** and ***Egon Baker***. This she would clearly have done on the basis that there was a special rule that sanctioned service on insurers in these circumstances. I am bound to say that it did appear to me on first blush in looking at this point that, contrary to Mr Simms' view, the posture of the insurer as regards a claim arising from the policy of insurance in this particular case must have been a relevant factor in any consideration of whether to allow an order for service on that very insurer to stand. However, I have in the end come to the view that the learned Master might equally, and justifiably, have taken the view that that was a matter between the insured and the insurer, which did not affect the right of the claimant – pursuant to the "special rule" - to serve the insurer in these circumstances. This ground of appeal must accordingly fail.

Grounds two and three

[41] In support of its application to set aside the order for substituted service, the appellant adduced evidence, which was uncontradicted, that it had 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 served on the appellant, the 3rd 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.

[42] In the light of this conclusion, I therefore think that grounds two and three must succeed.

Grounds four and five

[43] In the light of my conclusion on grounds two and three, which means that other steps will now have to be taken to ensure service of the claim form on the 3rd respondent, I do not consider it either necessary or desirable to come to any decision in this appeal on what is essentially an issue of fact. The question of who was actually driving the 3rd respondent's vehicle at the time of the fatal accident seems to me to be one for resolution at the trial of the action and I therefore express no view on it at this stage of the proceedings.

Conclusion

[44] The order I therefore make is as follows:

(i) The appeal is allowed and the order made by the Master on 13 January 2011 is set aside.

(ii) The *ex parte* order granted on 9 March 2010, that personal service on the 3rd respondent of the sealed claim form and particulars of claim dated 13 May 2009 be dispensed with and that service of the said documents be effected by service on The Insurance Company of the West Indies Limited at 2 St Lucia Avenue, Kingston 5 in the parish of St Andrew, is set aside.

(iii) The costs of this appeal and in the court below are to be borne by the 1st respondent, such costs to be taxed if not sooner agreed.

[45] Before leaving this matter, I must apologise to the parties for the delay in making this judgment available. While there are several reasons for the delay, I cannot properly, and do not, proffer any of them as an excuse.