[2022] JMSC Civ 167

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU 2019 CV 04052

BETWEEN	**ANNETTE ROSEMARIE MCCARTHY**	**CLAIMANT**
AND	**KENNARD GARDNER**	**1ST DEFENDANT**
AND	**KEVIN HAUGHTON**	**2ND DEFENDANT**

Mr. Lance Lamey instructed by Bignall Law for the claimant

Ms. Faith Gordon instructed by Samuda & Johnson for the applicant, Guardian General Insurance Company

HEARD: 13TH JULY & 30TH SEPTEMBER 2022

Civil Procedure - Rule 11.16 of the Civil Procedure Rules - application by insurance company to set aside service pursuant to order made under rule 5.14 of the Civil Procedure Rules - whether service on an insurer would allow the defendant to ascertain the contents of the documents - whether the insurer took reasonable steps to locate and effect service on the defendant.

MASTER C. THOMAS (AG)

Introduction

[1] By way of a notice of application for court orders filed on 26th August, 2021, the applicant, Guardian General Insurance Company Limited ("GGIC") is seeking to

have an order made by Master Orr (as she then was) set aside.[1] Specifically, GGIC is seeking to have order 3 set aside. Order 3 reads as follows:

> *(3) Permission is granted to the Claimant to serve the First Defendant by way of Substituted Service, with service on his Insurer, Guardian General Insurance Company Limited (GGIC), of 19 Dominica Drive, Kingston 5, Saint Andrew*.

[2] To ground its application, GGIC has argued that it is unaware of the current location of the 1st defendant. The grounds of its application also are that: it has been advised that the 1st defendant had migrated over three (3) years; it had dealt directly with the 1st defendant's agent, Covenant Insurance Brokers ("CIB") and not with the 1st defendant during the contract period of insurance; it has since been informed by CIB that CIB had been unsuccessful in making contact with the 1st defendant to advise him of these proceedings against him. Consequently, GGIC maintain that the method of service ordered by Master Orr would be insufficient to enable the 1st defendant to ascertain the contents of the claim form and particulars of claim filed in these proceedings.

Background

[3] The genesis of the claim is a motor vehicle accident which occurred at the intersection of Hope Road and Richings Avenue in the parish of Saint Andrew. On 24th December 2017, the claimant was a passenger aboard a Honda Civic motor car bearing license plate PH 3740. The 2nd defendant was, at the material time, the driver, of the motor vehicle registered 7993 HQ that is owned by the 1st defendant. It is alleged that the 2nd defendant was travelling behind the Honda Civic motor car that the claimant was travelling in. The claimant pleaded that the 2nd defendant drove carelessly, failed to stop and consequently collided into the

[1] See – Formal Orders On "Without Notice" Application for Extension of the Validity of the Claim Form for Specified Method of Service, which was filed on 28 October 2020.

rear of the vehicle in which she was a passenger. This, she avers, caused her to suffer injury, loss and damage as well as incur expense.

[4] The procedural history of the matter is as follows:

I. On 16th October 2019, the claimant initiated the instant claim. On that same day, notice of proceedings had also been filed, addressed to GGIC.

II. On 23rd October 2019, GGIC sent a letter to CIB in relation to the claim. [2]

III. On 23rd December 2019, '"Without Notice" Application for Extension of the Validity Claim Form and For Specified Method of Service" [*sic*] was filed on the claimant's behalf. This was supported by two (2) affidavits, filed on the same day. One was sworn to by Mr. Vaughn O. Bignall, attorney-at-law and partner for the firm, Bignall Law. The other was sworn to by Mr. Howard Wilks, a process server for Bignall Law.

IV. On 31st July 2020, a second "Without Notice" Application for Extension of the Validity Claim Form and for Specified Method of Service" [*sic*] was filed on Ms. McCarthy's behalf. This time, the application was supported by the Affidavit of Monique Thomas in Support of Application for Specified Method of Service.

V. On 23rd October 2020, Master Orr (Ag) (as she then was) made the orders dispensing with personal service and granted permission to the claimant to serve the 1st defendant by way of specified service, with service on his insurer GGIC. She also granted permission to the

[2] The caption of the letter itemized three different claims, including this present claim, to which the 1st defendant and the 2nd defendant are the named defendants. In the letter, GGIC urged CIB to remind the 1st defendant that if he or his driver received any legal correspondence in relation to the accident, it should be forwarded to GGIC immediately and unanswered for their handling; failure to do so would be a breach of the 1st defendant's policy.

claimant to serve the 2nd defendant by way of specified service, by inserting a Notice of Proceedings in two (2) publications in the newspaper one (1) week apart.

VI. On 26th August 2021, GGIC filed the notice of application for court orders, with which this judgment is concerned. This application was supported by the Affidavit of Joseph Evering in Support of Application for Court Orders, also filed on the same day.

VII. On 27th August 2021, GGIC filed a second affidavit of Joseph Evering in support of its application, which in essence contained the same evidence as the previous affidavit, save and except that this affidavit exhibited the documents that had been mentioned in the previous one but had in error not been exhibited.

[5] In his affidavit in support of the application, Mr. Joseph Evering deponed that GGIC had been served with the ex parte order of Master Orr (Ag) along with the claim documents on 23 February 2021.

[6] Mr Evering deponed that in the year 2017, GGIC offered motor insurance coverage against third party risks to members of the public, and persons desirous of contracting with GGIC for insurance coverage would do so directly or through an insurance broker with whom GGIC was associated. He deponed that in circumstances where members of the public utilized the service of an insurance broker to contract with GGIC for insurance coverage, the broker would communicate directly with GGIC in respect of all matters pertaining to the proposal for the said policy of insurance as well as such matters involving the policy of insurance ultimately created between the parties.[3]

[3] See – Paragraph 3 of the "Affidavit of Joseph Evering in Support of Application for Court Orders filed on 27th August 2021.

[7] Mr. Evering further deponed that this "broker business" arrangement meant that GGIC had no direct contact with the insured and would only be privy to such information concerning the insured which was included in the proposal form submitted by the broker to GGIC at the date of the proposal for insurance and any subsequent changes made on a renewal of the said policy which were included in the documentation submitted on such a renewal.[4]

[8] At paragraph 5 of his affidavit, Mr. Evering deponed the following:

> *"5. On January 9, 2018 Mrs. Stephine Brooks of Covenant Insurance Brokers Limited (Covenant) the broker and Agent for Kennard Burnett Gardner, submitted to the Applicant a Memorandum dated January 9, 2018 issued by Covenant's Underwriting Department and proposing new business for Third Party Public Commercial Insurance coverage on behalf of Mr. Gardner. Attached to the said Memorandum were the completed Proposal Form, proof of address for Mr. Gardner and Cover Note No. G065922 dated November 23, 2017 and issued by Covenant for a period of 30 days, while Mr. Gardner's said proposal was being considered by the Applicant."*

[9] Then, at paragraph 6 of his affidavit, he averred that:

> *"6. The Applicant duly accepted the said proposal for insurance coverage submitted by Covenant as agents for Mr. Gardner and incepted Policy Number JJ AGT 0953081 which said Policy was subsequently renewed by Mr. Gardner through Covenant for the period December 5, 2018 to December 4, 2019. At the date of the said renewal no new/additional information concerning Mr. Gardner was provided by Covenant to the Applicant."*

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[4] See – Paragraph 4 of the "Affidavit of Joseph Evering in Support of Application for Court Orders", which was filed on 27th August 2021.

Submissions

For GGIC

[10] Ms. Faith Gordon, submitted that the rules of the Civil Procedure Rules, 2002 ("CPR") provide that an application for an order to serve by a specified method must be supported by evidence on affidavit specifying the method of service proposed. Further, she submitted that this affidavit must show that the method of service is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim. Ms. Gordon relied on rule 5.14 of the CPR and the authority of ***Insurance Company of the West Indies Limited v Allen (Shelton) et al*** [2011] JMCA Civ 33.

[11] Learned counsel contended that the claimant did not comply with the rules. Specifically, Ms. Gordon asserted that the affidavit of Vaughn O. Bignall filed on 23rd December 2019 and /or the affidavit of Monique Thomas did not set out how serving the documents on GGIC would enable the 1st defendant to ascertain the contents of the claim form and particulars of claim.

[12] Ms. Gordon also submitted that the 1st defendant had obtained his policy of insurance through GGIC from a broker, CIB. She argued that CIB negotiated the policy of insurance between the 1st defendant and the GGIC. Further, she maintained that there was no contact between GGIC and the 1st defendant in relation to the insurance policy as the correspondence that took place between GGIC and CIB. She also contended that the relationship between GGIC and CIB did not put GGIC in a position to bring the relevant documents to the attention of the 1st defendant, because CIB is not an agent of GGIC, as it is an independent broker. To support this, Ms. Gordon relied on the authority of ***Anglo-African Merchants Limited & Another v Bayley and Others*** [1970] 1 Q.B. 311.

[13] Learned counsel further submitted that it could not be inferred that knowledge of the broker is knowledge of the insurers, unless it is material to the risk being insured and shared with the insurers by the broker. Additionally, Ms. Gordon

submitted that where there is a broker involved in the negotiation of the policy of insurance, the assumption should be that the insurers know nothing outside of what information is provided to it by the assured through its broker. On this point, she directed the court to the case of ***Newsholme Brothers v Road Transport and General Insurance Company Limited*** [1929] 2 K.B. 356.

[14] Ms. Gordon indicated that in good faith, GGIC had contacted CIB to bring the matter to its attention, so that it could make contact with the 1st defendant. Subsequently, GGIC was informed that attempts to make contact with the 1st defendant to advise him of the current proceedings had been unsuccessful. Through this process, GGIC learned that the 1st defendant was outside of the jurisdiction and had been outside of the jurisdiction for approximately three (3) years prior.

[15] Consequently, Ms. Gordon submitted, GGIC was never and is not currently in a position to bring the contents of the relevant documents to the attention of the 1st defendant.

For the claimant

[16] Mr. Lamey argued that GGIC ought to be precluded from being heard on this application, as it is six (6) months late, according to rule 11.16(2) of the CPR. Learned counsel referred to Mr. Evering's evidence in relation to this application that indicates that GGIC was served with the formal order in this regard on 23rd February 2021, but had filed this present application on 26th August, 2021.

[17] Mr. Lamey submitted that GGIC ought to settle the claim as it is required to do so by contract and by section 82 of the Insurance Act. This, he argued, is because the insurer shall accept liability arising under the policy, where its agent has received any premium for a contract. Mr. Lamey contends that GGIC is not at liberty to avoid liability in this regard, nor to set aside the service of the claim by virtue of never being in direct contact with the insured.

[18] Mr. Lamey argued that GGIC was aware of the proceedings from as early as late 2017 and early 2018, but chose to repose its interest in the matter to its agents.

[19] In response to GGIC's assertion that it had been advised that the 1st defendant had migrated over three years ago, Mr Lamey submitted that this submission was to be rejected by the court as inadequate attempts to make contact with the insured. He urged the court to consider that GGIC had not presented any evidence to indicate the basis upon which it had been reliably advised of the 1st defendant's migration, which evidence was required.

[20] In relying on section 18(1) of the Motor Vehicles (Third Party Risks) Act, Mr. Lamey pointed out that GGIC has not sought to avoid the policy or to declare that the insured was in breach of his policy. Additionally, Mr. Lamey argued that the 2nd defendant is aware of the accident as the 2nd defendant's signature was on the Motor Vehicle Accident Report Form. Based on this, Mr. Lamey submitted, GGIC's agents were in contact with the 2nd defendant up to at least, 4 January 2018, in order to have produced this signed copy.

[21] Mr. Lamey contended that the efforts of GGIC to contact the 1st defendant were not sufficient, especially given the assumed relationship between them. Mr. Lamey took issue with GGIC's attempts to make contact with the 1st defendant through letters to CIB and then from CIB to the 1st defendant's address, contact via telephone and the purported speaking to an "acquaintance" and stated that there was no affidavit evidence to support this. Mr. Lamey argued that GGIC had not mentioned a single visit by any of its investigators to the last known address of the 1st defendant. There was no mention (or evidence put before the court) of any other or further methods of communicating with the 1st defendant in order to bring the relevant documents to his attention. To support these submissions, Mr. Lamey relied on the authorities of ***Damion Welch v. Roxneil Thompson & Tyrone Brown*** [2018] JMSC Civ 59 and ***Moranda Clarke v. Dion Marie Godson & Donald Ranger*** [2015] JMSC Civ 48.

[22] Mr. Lamey also argued that the rule of subrogation supports the valid service of the relevant documents on GGIC. He placed reliance on the authority of ***Egon Baker v Novelette Malcolm & Steadman Lewis Gordon*** Claim No. C.L. 1999/ B 055. Learned counsel sought to distinguish the case of **Egon Baker** from the aforementioned case of **ICWI v Allen (Shelton)**. He argued that although the decision of that case has not been met with widespread approval, **Egon Baker** is still not expressly overruled or regarded as bad law.

Discussion and Analysis

[23] The application before me is one to set aside an order that was obtained on an ex parte application. I therefore, think, it is necessary to briefly consider the approach of the court in applications challenging orders made on ex parte applications. In ***Bardi Ltd v McDonald Millingen*** [2018] JMCA Civ 33, Phillips JA considered extensively some of the relevant authorities on ex parte orders, the principal one being the Privy Council decision in ***Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd*** [1991] 4 All ER 65. Phillips JA's canvassing of the issue was within the context of a provisional charging order, but I do not think that this in any way renders her careful analysis inapplicable to any other application to set aside an ex parte order.

[24] In **Bardi Ltd v McDonald Millingen,** Phillips JA, with whom F Williams JA agreed, examined at length the decision of the Privy Council in **Vehicles and Supplies Ltd** in which their lordships board had to consider whether a judge of coordinate jurisdiction could set aside an order for an ex parte order for a stay of proceedings. At paragraph [20], Phillips JA stated:

> "*[20] The Law Lords held that an ex parte order is in its nature provisional only and Carey J was right in following and adopting what was said to this effect by Sir John Donaldson MR in* ***WEA Records Ltd v Visions Channel 4 Ltd and Others*** *[1983] 2 All ER 589. The Law Lords noted that neither*

> *the Civil Procedure Code (the Code) nor the Rules (which existed at that time) contained any express provisions relating to the discharge of ex parte orders. They referred to the English Rules of Supreme Court, Order 32, rule 6 which stated that "[t]he Court may set aside an order made ex parte" (which rule at that time was embraced in the Code, pursuant to section 686)."*

[25] Phillips JA reviewed what may be regarded as the salient aspects of **WEA Records Ltd** and then set out what she described as the "seminal statement" of Sir John Donaldson contained at page 53 of the law report. For present purposes, the relevant portion of Sir Donaldson's dictum is as follows:

> *"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. This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision."*

[26] She then stated at paragraph [25]:

> *"[25] The Master of the Rolls therefore acknowledged and reiterated that an order made on an ex parte application can be reviewed by another judge and varied and or discharged. He said that jurisdiction is inherent in the provisional nature of any order made ex parte."*

[27] Then at paragraphs [31] and [32], she stated:

> *"[31] The decision must be reviewed against the background of a different argument, maybe different parties' interests, with different perspectives, perhaps facing different urgencies, losses and expectations. Additionally, in any event, the order made ex parte is provisional in nature, and therefore subject to change, having been made on the basis of submissions from one side only. This does not in any way take away, but actually underscores the requirement for full and frank disclosure, and for candour to the court, and no party must mislead the court either intentionally, or negligently in a without notice hearing. But it does not only require a material change in circumstances, a misleading of the court or fraud for the court to review vary or discharge an order made ex parte.*
>
> *[32] I do not think that Dingemans J had that interpretation in* ***Parr****, when he stated, referring to the obvious potential difficulties judges experienced when setting aside or varying orders made by judges of co-ordinate jurisdiction, that the authorities establish that "the circumstances in which the jurisdiction to set aside or vary might be exercised include*

> *situations where there was a material change of circumstances, where a Judge was misled, or where there was fraud" (emphasis added). It was clear that his use of the word "include" in this context, meant that this was not an exhaustive list, and was not a pre-requirement for the exercise of the discretion of the judge in the making or reviewing of provisional or final charging orders. It was not, in any event, a statement made exclusively in relation to an ex parte jurisdiction. At any rate, the rules provide, as indicated, that any order made by the court can be varied or revoked by the court."*

[28] There appears to be no authority that establishes that an application to set aside substituted service (or service by specified service as it is now referred to in the CPR) including service on an insurer of a motor vehicle, is a special category of cases to be treated differently from any other order obtained ex parte. Therefore, having regard to the dictum of Phillips JA, I am of the view that on this inter partes application to set aside, I am required to consider whether in light of the evidence, particularly the evidence presented on behalf of GGIC that was not before the court on the ex parte application, the requirements in rule 5.14 of the CPR, under which the order for specified service was made, have been met, that is, whether, service of the claim documents on GGIC is likely to bring the contents of the claim form and particulars of claim to the attention of the 1st defendant.

[29] Against this background and in light of the submissions of both counsel, I am of the view that these are following issues for determination:

(i) Whether the court should consider the application in light of the apparent delay in its filing;

(ii) Whether service of the claim form and particulars of claim on GGIC should be set aside;

Whether the court should consider the application in light of the apparent delay in its filing

[30] In ***Herman Stewart v Higgins & Jamaica National General Insurance Co*** [2022] JMSC Civ 37, D. Fraser J (as he was then) considered that the applicable rule in these circumstances is rule 11.16. He stated:

> *"I consider that the applicable rule is actually CPR rule 11.16 which deals with applications to set aside or vary order made on without notice application which provides a Respondent, (who does not necessarily need to be party), with an opportunity to apply to the court within 14 days."*

[31] Rule 11.16(3) states:

> "(*1*) *A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.*
>
> *(2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.*
>
> *(3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule*."

[32] GGIC should therefore have filed its application to set aside within fourteen (14) days of service of the formal order containing the orders of Master Orr (Ag). Mr

Lamey is therefore correct in his contention that the application was filed out of time, in that GGIC's evidence was that it was served on 23 February 2021 and then filed its application on 26th August 2021. Ms Gordon's response is to point to rule 11.16(3) of the CPR and to submit that the requirements were not complied with. There can be no dispute that the formal order that was served on GGIC did not comply with rule 11.16(3).

[33] In ***BUPA Insurance v Hunter*** [2017] JMCA Civ 3, the Court of Appeal considered the effect of a breach of rule 11.6(3). In that case, an order had been obtained ex parte for service outside of the jurisdiction. On its application to set aside the order, it was argued by one of the defendants that since the claimant had failed to comply with rule 11.15 (for service of the application and evidence in support of the parties to the application) and 11.16(3), the court should have declined jurisdiction to hear the claim. On appeal of the decision of the court below refusing the application, McDonald-Bishop (JA) with whom the other members of the court agreed, found that in the circumstances, the learned judge below was correct to treat the breach as irregularity and therefore something that could have been rectified by him in the proper exercise of his powers under the CPR (rule 26.9) and the general law. In that case, among other things, the learned judge below had extended the time for the application to be filed as it had been filed outside the fourteen (14) day period.

[34] As was the case in **BUPA**, I am of the view that the failure of the claimant to comply with rule 11.16(3) of the CPR should be treated as an irregularity which would not invalidate the service of the order. Also, if indulgence is to be granted to the claimant with respect to this failure, then equally, in accordance with the overriding objective to deal with cases justly, the interest of justice and fairness would be best served in the particular circumstances of this case if indulgence were to be granted to GGIC to be heard on its application to allow for the ventilation of the issues even though no formal application for an extension of time was filed.

Whether service of the claim form and particulars of claim on GGIC should be set aside

[35] It seems to me that the judgment of Morrison JA (as he was then) in **ICWI v Shelton** makes it clear that if there is no likelihood that service on an insurance company will bring the contents of the claim form and particulars of claim to the attention of the 2nd defendant then specified service should not be ordered. At paragraph [35] of **ICWI v Shelton**, Morrison JA after considering that rule 5.14 (specified service) of the CPR supplemented rule 5.13 (alternative service), stated:

> *"[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] In that case, the appellant, ICWI appealed the decision of Master George (Ag.) (as she then was), who had refused to set aside an ex parte order made allowing for service to be effected on ICWI in respect of its insured, the 3rd defendant. On

appeal, ICWI argued five grounds of appeal, two of which were concerned with whether service on ICWI would enable the 3rd defendant to ascertain the contents of the claim form and particulars of claim.

[37] Morrison JA, found that on the uncontradicted evidence provided by the insurance company that the company had no report from their insured, the 3rd defendant, of the accident giving rise to the claim; that it was unable to contact him and that it had no knowledge of his current address, there was no evidence before the Master that could possibly satisfy the court that if the claim form were served on the insurance company, the 3rd defendant 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.

[38] The Court of Appeal decision in ***Nico Richards v Roy Spencer (Jamaica International Insurance Company Limited Intervening)*** [2016] JMCA Civ 61 demonstrates the importance of the court having evidence that service of the documents on the insurance company is likely to bring the contents of the claim documents to the defendant, who is its insured. In that case, the defendant to be served was the driver of the motor vehicle involved in the accident; however, he was not owner of the motor vehicle. An order had been made ex parte for service of the claim documents to be effected on the owner's insurance company. Master Tie (Ag) (as she then was) set aside the ex parte order for service on the basis that there was no evidence that the driver was in fact able to ascertain the contents of the documents or that it was likely that he would have been able to do so through service on the insurance company.

[39] On appeal, it was argued, among other things, that the insurance company was obliged to provide the court below with evidence as to its efforts, if any, to contact the driver or to ascertain his whereabouts and that the evidence was plain that no such effort was made. Sinclair-Haynes JA, with whom the other members of the court agreed, found that rules 5.13 and 5.14 of the CPR require affidavit evidence proving that the method of service sought will enable the

person to be served to ascertain the contents of the claim form and particulars of claim and no affidavit was filed on behalf of the respondent.[5] It was held that in the absence of evidence on affidavit before Master Tie (Ag) that the method of service sought would have more likely enabled the driver to ascertain the contents of the documents, the court had no basis to interfere with the exercise of the Master's discretion.[6]

[40] In ***Jepthah Davis v Roy Marshall*** [2017] JMSC Civ 161, Master A Thomas (as she then was) having considered some of the relevant authorities on setting aside specified service on an insurer, adumbrated the following principles as emanating from the authorities:

> *i.* "*Where a method of alternative service is employed by the claimant, the court should be satisfied that the contents of the Claim Form and Particulars of Claim are likely to come to the attention of the defendant. Once it is not so satisfied, the order for alternative (substitute) service and any consequential order and or judgment should be set aside; and*
>
> *ii.* *Where service is effected on the insurers of the defendant, once it is established that the insurers have made all reasonable efforts to bring the contents of the Claim Form and Particulars of Claim to the attention of the defendant and has failed, then the alternative service should be set aside*."

[41] On the point of reasonableness, guidance may be found in the judgment of Master Bertram-Linton (as she was then) in ***Moranda Clarke v Dion Marie Godson and Donald Ranger*** [2015] JMSC Civ 48. One of the issues in **Moranda Clarke** was that the 2nd defendant, had migrated and the insurer was disputing the order for specified service that affected it.

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[5] See paragraph 40 of judgment
[6] See paragraph 43 of judgment

[42] Master Bertram-Linton made the following pronouncements in relation to the reasonableness of the methods taken to contact the 2nd defendant in that case:

> *"[37] What is reasonable must be looked at, as in my judgment the court must not fall into the trap of expecting necessarily the steps of enquiry to be so onerous that it becomes unrealistic for the insurance company to achieve.*
>
> *[38] I note that once the information was received that the 2nd defendant was abroad nothing further seems to have been done."*

[43] Therefore, in order to obtain the relief, they seek, GGIC's evidence must demonstrate that service on it would not be likely to enable the 1st defendant to ascertain the contents of the claim form and the particulars of claim. In order to sufficiently demonstrate this, GGIC needs to also demonstrate the attempts or steps made to locate the 1st defendant because, in my view, GGIC cannot properly assert that it is unlikely that the documents will come to the attention of the 1st defendant if they are unable to show that it made reasonable attempts to locate him.

[44] The evidence before Master Orr (Ag) established that GGIC was the insurer of the 1st defendant's motor vehicle at the time it was involved in the accident and there is no dispute in relation to this fact. The evidence of Mr Evering on behalf of GGIC is that the contract of insurance between GGIC and the 1st defendant was done through broker business, that is, through CIB and that the 1st defendant dealt directly with CIB has not been challenged. No challenge evidentially has been raised by the claimant in relation to this assertion. There is therefore no dispute that GGIC, apart from being the insurer, had no direct contact with the 1st defendant. However, there is evidence that in forwarding to GGIC, the documents pertinent to the proposed contract of insurance between the 1st defendant and GGIC, CIB had sent, among other documents, the Proposal for Motor Insurance document which was completed by the 1st defendant dated 23 November 2017 in

which his address was stated, as well as proof of that address provided[7]. In addition, there is documentation from GGIC that the policy of insurance was effected for the period 23 November 2017 to 22 November 2018. It is Mr Evering's evidence that the policy was renewed for the period 5 December 2018 to 4 December 2019 and that at the date of the renewal, no new or additional evidence concerning the 1st defendant was provided to GGIC by CIB. In addition, it appears that the accident, was reported by the 2nd defendant, on 4 January 2018, a few days after the accident occurred. The claim form was filed on 16 October 2019 and GGIC was served with notice of proceedings on the same day. GGIC was therefore aware of the accident concerning its insured and was served with notice of the claim arising from it during the period that the insurance contract was valid. During this time, there was no change to the address of the 1st defendant. Therefore, on this state of the evidence, without more, it does not seem to me that it is sufficient for GGIC to put forward the argument that it did not deal directly with the 1st defendant to anchor its position that service of the claim on GGIC would not likely bring the contents to the attention of the 1st defendant. While it may be that CIB was the company dealing directly with the 1st defendant, the fact is that GGIC had a contract of insurance with the 1st defendant and the essential information needed to contact the claimant was in its possession at the time of the filing of the claim.

[45] In my view, the question of whether CIB was the agent of the 1st defendant is immaterial because the basis on which an insurance company is served is not that the insurance company is the agent of the insured but rather that, as was stated by Morrison JA, it is likely that service on the insurer would likely bring the contents of the claim documents to the attention of the 1st defendant. The evidence I have outlined at paragraph [44] does not, in my view, lead to a conclusion that it is unlikely that service on GGIC would bring the contents of the claim documents to the 1st defendant.

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[7] See Exhibit JE1

[46] It seems to me then that GGIC must bring evidence that since being served with the order, it cannot contact the 1st defendant in that the efforts made to contact him were reasonable yet futile. At paragraphs 10 – 14, Mr Evering outlined the events that unfolded after it was served with Master Orr's order. In summary, he stated that:

(i) GGIC's attorneys, Samuda and Johnson informed the claimant's attorney by way of letter dated 25th November 2020 that GGIC had never been in touch with the 1st defendant directly as the insurance business had come directly through CIB who communicated with GGIC on the 1st defendant's behalf. (paragraph 10).

(ii) The claimant's attorneys were also advised by the letter of 25th November 2020 that CIB had informed GGIC that the 1st defendant had migrated approximately 3 years prior and CIB was making every effort to communicate with the 1st defendant in the usual course of business to advise him of the claim and, if possible, the contents of the claim documents (paragraph 11)

(iii) The letter of 23rd November 2020 also advised the claimant's attorneys that they would be informed of the outcome of the efforts to bring the contents of the claim documents to the attention of the 1st defendant and if those efforts were unsuccessful, Samuda and Johnson's instructions were to apply to set aside Master Orr's order.

[47] Then at paragraphs 13 and 14, he stated:

"13. *GGI was recently informed by Ms Jacqueline Morrison of Covenant and I verily believe that Covenant's continued efforts to contact the 1st defendant at the address they had on file*

ultimately resulted in their speaking with an acquaintance of his in Jamaica who confirmed that the 1st defendant had migrated and that he (the acquaintance) would attempt to contact him to get word to him about these proceedings. The applicant has since made enquiries of Covenant and has been informed and I verily believe that Covenant has been unsuccessful in its efforts to contact the 1st defendant to advise him of this claim and of the contents of the claim form and particulars of claim filed herein.

14. In light of the foregoing and the ongoing failure of Covenant to make contact with the 1st defendant, I am of the view that Master Orr (Ag) [sic] said Order dated October 23, 2020 which was directed at bringing the contents of the claim form and particulars of claim to the attention of the 1st defendant by serving the same on the applicant has not secured its intended objective. Consequently, the 1st defendant is unaware of this claim and by extension of the contents of the claim form."

[48] I am of the view that while GGIC, having been served with the order, was obliged to attempt to locate the 1st defendant, in the same way that it was entitled to rely upon the information provided by CIB during the process leading up to the inception of the insurance policy with the 1st defendant, it was entitled to rely on the information provided by CIB in relation to locating the 1st defendant. Therefore, I am not of the view that CIB having informed GGIC that the 1st defendant had migrated three (3) years ago, that it was necessary for GGIC to indicate the basis upon which it was advised of the 1st defendant's migration, as contended by Mr Lamey. It is curious that based on the information relayed to CIB and GGIC, the 1st defendant would have migrated three years prior to November 2020 (see paragraph [44] (ii) above), which would have meant that the 1st defendant would have migrated from as far back as 2017, notwithstanding that he had renewed his policy for 2018 to 2019 and there had been no change of address forthcoming.

Nonetheless, I am view that the important evidence in relation to the 1st defendant's migration is that an acquaintance of the 1st defendant in Jamaica had confirmed the 1st defendant's migration. I do not therefore think that it was necessary for GGIC to use other methods to confirm the migration of the 1st defendant.

[49] It seems to me that what is also significant is that the information from CIB to GGIC made it clear that there was in fact a person through whom the 1st defendant could possibly be contacted. Therefore, it was incumbent on GGIC to pursue this avenue as far as it was possible to assist it in locating the 1st defendant. GGIC having been informed by CIB that this person had informed that he/she would attempt to get in contact with the 1st defendant, it was necessary for GGIC to at least put before the court evidence of the outcome of those attempts. Mr Evering's assertion that CIB had subsequently informed that it had been unsuccessful in its efforts to contact the 1st defendant was not sufficient because it left many questions unanswered, such as: Was it that the 1st defendant's acquaintance was unable to contact the 1st defendant? Was it that the 1st defendant's acquaintance contacted the 1st defendant but did not make any further contract with CIB to inform them of the outcome of his efforts? Was it that CIB could no longer find the 1st defendant's acquaintance? Was it that CIB was unable to get information from this person as to the country where the 1st defendant now resided which prevented CIB or GGIC from making efforts of their own to contact the 1st defendant? On this state of the evidence, I am unable to conclude that the efforts to locate the 1st defendant were reasonable. The case of **ICWI v Shelton** is distinguishable because in that case, the accident had not been reported and more importantly, there was no third party who provided a link to the defendant, which link had not been fully explored.

[50] Mr. Lamey in his submissions raised the issue of subrogation and also referenced section 18(1) of the Motor Vehicle (Third Party Risks) Act. However, in light of my conclusion on the efforts of GGIC to locate the 1st defendant, I do not see the need to express any views on that issue.

Conclusion

[51] Having carefully examined the evidence presented before me, I have determined that GGIC did not take sufficient and reasonable steps to make contact with the 1st defendant to enable him to ascertain the contents of the documents.

[52] I therefore make the following orders:

(i) The application to set aside the order for service on Guardian General Insurance Company is refused.

(ii) Leave to appeal is granted

(iii) Costs of the application to the claimant to be taxed, if not agreed.