



[2023] JMSC Civ 62

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2014HCV05145**

<b>BETWEEN</b>	<b>DEBBIE-ANN WHITELEY</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ROHAN MARTIN</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>MARLON PRENDERGAST</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**Mr Lance Lamey instructed by Bignall Law for the claimant.**

**Ms Raquel Dunbar instructed by Dunbar & Co for Advantage General Insurance Company Limited.**

**Heard November 22, 2022 and March 31, 2023**

***Setting aside order for alternative method of service of claim form and particulars of claim on insurer - extending time to make the application - whether the insurer's efforts to contact its insured were reasonable.***

**CORAM: JARRETT, J**

### **Introduction**

On a without notice application heard on December 7, 2016, Master Harris ordered that Advantage General Insurance Company Limited (AGI) be served with the claim form and particulars of claim filed in this matter, as a method of alternative service on the 1<sup>st</sup> defendant, its insured. AGI now seeks to set aside that order on the basis that it was unable to locate the 1<sup>st</sup> defendant and to notify him of the

contents of the documents. AGI also seeks an extension of time within which to make the application.

### **Procedural background**

- [1] In her claim form and particulars of claim filed on October 29, 2014, the claimant claims against the defendants in negligence. She alleges that on July 31, 2013, she suffered personal injuries in a motor vehicle accident along Peck Street, Linstead in the parish of St Catherine, when the 2<sup>nd</sup> defendant so negligently drove the 1<sup>st</sup> defendant's motor vehicle that it collided into the vehicle in which she was a passenger.
- [2] In her without notice application filed on June 15, 2015, the claimant sought the order for alternative service on AGI, on the basis that attempts to serve the 1<sup>st</sup> defendant were unsuccessful; his whereabouts are unknown; and at the time of the accident, AGI was the insurer for his motor vehicle. In the affidavit in support of the application, Vaughn Bignall, attorney-at-law for the claimant, gave evidence of the failed attempts to effect personal service on the 1<sup>st</sup> defendant. He deponed that a Notice of Proceedings was served on AGI on October 30, 2014, AGI has not sought to "extricate" itself from indemnifying the claimant, and he believes that if the claim is served on AGI, the contents of the documents will come to the attention of the 1<sup>st</sup> defendant. There was also an affidavit of Howard Wilks in support of the application. He is a process server, and he gave evidence of his unsuccessful attempts to serve the 1<sup>st</sup> defendant. The without notice order, the claim form, the particulars of claim and supporting documents, were all served on AGI on March 17, 2017.

### **AGI's application**

- [3] AGI's application was filed on August 21, 2017. On that same day, it filed an Acknowledgement of Service in which it indicated that it was served on March 17, 2017, by an order for substituted service and that it intends to challenge that order. AGI's counsel said that the Acknowledgement of Service was served on

the claimant's counsel on August 22, 2017. An affidavit of Delroy Lawson a private investigator was filed on AGI's behalf on May 28, 2020. Later, an Affidavit of Ruthann Morrison - Anderson in Support of the Notice of Application to Set Aside Substituted Service was filed on September 16, 2020. According to counsel for the claimant, AGI's application, the supporting Affidavit, and the affidavit of Delroy Lawson were served on Bignall Law, on February 18, 2022.

**[4]** Ruthann Morrison-Anderson says in her affidavit that she is AGI's legal counsel. AGI was served with the without notice order on March 17, 2017, and on being served it searched its records, discovered that AGI insured the 1<sup>st</sup> defendant in May 2013, but the policy lapsed in August 2015. It set about to contact him by way of correspondence but received no response. In May 2017, it retained Dunbar & Co. Attorneys-at-law. Dunbar & Co. sent out correspondence to the 1<sup>st</sup> defendant at his last known address at Cow Gully District, Bog Walk, St Catherine, by both ordinary and registered mail. The letter dated August 15, 2017, sent by ordinary mail to the 1<sup>st</sup> defendant was returned by the postmaster on October 3, 2017, indicating that it was not collected. A copy of the returned envelope is exhibited to her affidavit. She says she believes that Dunbar & Co informed the claimant's counsel that AGI was unable to locate the 1<sup>st</sup> defendant and would be seeking to set aside the without notice order. She was advised by Dunbar & Co. that they made attempts to contact the 1<sup>st</sup> defendant by telephone but were unsuccessful. She says AGI retained Delroy Lawson, a private investigator to search for the 1<sup>st</sup> defendant, and she refers to his affidavit.

**[5]** In his affidavit, Delroy Lawson says he is a private investigator and process server with over 20 years' experience. On December 12, 2018, he was instructed by Dunbar & Co to locate the 1<sup>st</sup> defendant in Cow Gully District, Bog Walk, St Catherine. On February 2, 2019, he visited that district, spoke with taxi drivers and shop operators in the area and in the nearby communities of Charlton, High Mountain, Church Road and August Town Road in St Catherine, but no one he spoke with knew the 1<sup>st</sup> defendant. He was directed to two men with the first name

“Rohan”, but when he spoke with them, their last names were not “Martin”. He said that he was therefore unable to serve the 1<sup>st</sup> defendant with the court documents.

**Should an extension of time be given to AGI to set aside the without notice order**

**[6]** CPR 11.16 makes provision for the setting aside or varying of applications made without notice. The Rule provides as follows: -

11.16 (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 made 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

The footnote to Master Harris’ order contains the statement referred to in CPR11.16(3).

**[7]** CPR 11.16 mandates that an application under the rule must be made within 14 days after the service of the without notice order. It is uncontroversial that the court has the jurisdiction to extend this time in the exercise of its discretion. But this discretion can only be properly exercised based on the evidence presented to the court. It would seem to me that the court must consider evidence in respect of the reasons why the 14-day timeline was not met; the steps taken after service of the without notice order in furtherance of setting it aside; and the reasons advanced for seeking to set aside the order. It is also equally uncontroversial that the principles the court applies in the exercise of its discretion to extend time to set

aside an order made without notice are those it generally applies, *mutatis mutandis* to applications for extensions of time to comply with court orders, other rules of court or practice directions. Therefore, the reasons for the delay, the length of the delay and the merits of the reasons for setting aside the without notice order, are in my view, the core considerations that apply.

### **Submissions**

- [8] Ms Dunbar in her written submissions sought to invoke CPR 26.1(2)(c) which empowers the court to extend time for compliance with an order of the court, rule, or practice direction. She orally submitted that AGI is asking for the extended time because they were unable to make the application within 14 days. She said they were making phone calls and waiting to see whether their letters would bear fruit. Had they been able to locate the 1<sup>st</sup> defendant, counsel said the application would never have been made. Mr Lance Lamey, counsel for the claimant argued against the application and said that it took nearly 5 years for it to be served. In his view, that delay was inordinate and prejudicial to his client as her claim is now statute barred.

### **Analysis and discussion**

[9]

AGI's application was filed 4 ½ months after the service of the without notice order. It was served nearly 5 years after service of that order. CPR 11.16 requires that the application be made within 14 days of service of the order. It does not say that the application must be made **and** served within that period. CPR 11.4 says that where an application must be made within a specified time, it is so made if it is received by the registry or made orally to the court within that period. There is evidence from AGI of the steps taken after service, as well as of the reasons for seeking to set aside the order, but there is no direct evidence to explain why it took 4 ½ months to make the application. Counsel's submissions are not evidence, but from the affidavit of Ruthann Morrison-Anderson, it is a reasonable inference that AGI was seeking to locate the 1<sup>st</sup> defendant during this 4 ½ month period, before

making an application to set aside the without notice order. On the facts of this case, I find the reasons for the delay and the length of the delay to be quite reasonable. AGI is expected to try to locate and contact the 1<sup>st</sup> defendant, before seeking to set aside the order. In my view, 4 ½ months was not an inordinate period to do so. As for the reasons for applying to set aside the order, I do not consider that they are lacking in merit. In the circumstances therefore, I will grant the application for an extension of time.

### **Should the without notice order be set aside**

#### **Submissions**

- [10] Ms Dunbar submitted that the affidavits of Ruthann Morrison–Anderson and Delroy Lawson demonstrate that AGI made reasonable efforts to locate the 1<sup>st</sup> defendant, but its efforts were unsuccessful. She argued that **Insurance Company of the West Indies Limited v Shelton Allen (Administrator of the Estate of Harland Allen) [2011] JMCA Civ 33** establishes that insurance companies are in no special position when it comes to alternative service in relation to their insureds. According to her, the evidence shows that the difficulties the claimant had in serving the 1<sup>st</sup> defendant are the same ones AGI encountered. She said that the claimant was given early notice of AGI's position when it served its acknowledgment of service.
- [11] Mr Lamey objected to AGI's application. He argued that the delay of 5 years since the without notice order was served has prejudiced his client as her claim is now statute barred. He did not consider that AGI's efforts were reasonable. He said no attempt was made to search for the 1<sup>st</sup> defendant by social media or by advertisement. Counsel cited the decision of Hart Hines J in **Damion Webb v Roxneil Thompson [2018] HCVJM59**, where the learned judge discussed the adequacy of the steps an insurer should take to contact its insured. Mr Lamey also cited the decision of Bertram Linton J in **Moranda Clarke v Deon Marie Godson and Donald Ranger [2015] JM59 Civ 48**, in which the court expressed the view, on the facts of that case, that advertisements seeking to find the whereabouts of an insured, were reasonable steps AGI could have taken. Bertram Linton J was

ultimately dissatisfied with the efforts made and refused the application to set aside the without notice order for alternative service.

### **Analysis and discussion**

- [12] The principles to be applied when deciding whether to grant an order for alternative service of originating process on an insurance company, were settled by the court of appeal in **Insurance Company of the West Indies Limited v Shelton Allen (Administrator of the Estate of Harland Allen)**. Morrison JA (as he then was) made it clear that there is no “special rule” that service on insurance companies is a proper substitution for service on their insured. Relying on the dicta of Lord Reading CJ in **Porter v Freudenberg [1915] 1KB 857**, he reminded us that it is a fundamental principle of the common law, that a defendant must be given effective notice of proceedings against him. CPR 5.13 is a recognition of that principle, in that it requires a court in the exercise of its discretion, to order an alternative method of service only where it is satisfied that the method chosen is sufficient to enable the contents of the claim to be ascertained by the defendant.
- [13] In **British Caribbean Insurance Company Limited v David Barrett [2014] JMCA App 5**, Brooks JA (as he then was), made the point that it has been settled since the decision in **Insurance Company of the West Indies v Shelton Allen ( Administrator of the Estate of Harland Allen)**, that an insurance company may have an order for alternative service set aside on the basis that it is not in contact with its insured. In my view the reason for that is obvious. If the insurer is not in contact with its insured, the likelihood that service of the claim on it would enable the contents of the documents to be ascertained by its insured is slim to none. That is the reason why, on an application such as the one before me, courts focus on the efforts made by the insurance company to locate its insured. If the efforts are meagre and insubstantial, it will be a difficult task for an insurer to successfully argue for the setting aside of an alternative service order on the basis that it is not in contact with its insured. Courts therefore look to see whether the insurer’s efforts

to make contact were reasonable. Reasonableness being measured on a case-by-case basis.

- [14] AGI's uncontradicted evidence is that on being served with the without notice order in March 2017, it searched its records and proceeded on a course to locate the 1<sup>st</sup> defendant. It's attorneys-at-law sent out correspondence by ordinary mail and registered mail to the 1<sup>st</sup> defendant's last known address. On August 21, 2017, it filed the application which is before me. On that same day, it filed an acknowledgment of service which it served the following day, telegraphing to the claimant that it intended to challenge the order for service. Up to that point, the limitation period had not yet expired. Letter to the 1<sup>st</sup> defendant dated August 15, 2017, was returned by the postmaster and a copy of the returned envelope exhibited by Ruthann Morrison-Anderson. AGI's attorneys-at-law also tried unsuccessfully to reach the 1<sup>st</sup> defendant by telephone calls. Even after it filed its application, it engaged Delroy Lawson, a private investigator in December 2018, to find the 1<sup>st</sup> defendant. His affidavit speaks to the visits he made to Cow Gully District and several adjoining communities in a bid to locate the 1<sup>st</sup> defendant.
- [15] In **Damion Webb v Roxneil Thompson**, AGI also sought to set aside an order for alternative service. In that case, Hart Hines J was not satisfied that the company made reasonable efforts in a timely manner to locate its insured. She found that AGI did not act reasonably in taking 1 year after the service of the without notice order, and 9 months after filing its application to set aside the order, to try to locate its insured at his home address. The learned judge also observed that no attempts were made to locate the insured through his next of kin or at his workplace.
- [16] In the case before me, there was no untimely response to the service of the without notice order on the part of AGI. The evidence of Ruthann Morrison-Anderson which has not been contradicted, is that AGI took steps to make contact with the 1<sup>st</sup> defendant upon being served with Master Harris' order. I find the company acted quite timeously. I do not consider that the learned judge in **Damion Webb v**



**Roxneil Thompson**, was seeking to lay down a set of hard and fast criteria to be followed in every case by an insurer. In my view Delroy Lawson's investigative efforts were substantial. The claimant has not pleaded that the 1<sup>st</sup> defendant was employed, nor has she pleaded the nature of any work that he is engaged in. Without evidence that the 1<sup>st</sup> defendant was, or is employed, or has or had a place of work; I am not prepared to impose on AGI an obligation to make any enquiries in that regard.

[17] I am quite satisfied, on the evidence before me, that the efforts made by AGI to contact the 1<sup>st</sup> defendant were reasonable. Not making any further enquires, including placing advertisements on social or traditional media, does not make those efforts less reasonable.

### **Conclusion**

[18] In the result, I make the following orders: -

- a) Extension of time is granted to Advantage General Insurance Company Limited to make its application to set aside the without notice order made on December 7, 2016.
- b) The without notice order made on December 7, 2016, for service on Advantage General Insurance Company Limited of the claim form, the particulars of claim, the prescribed notes to defendant, the form of acknowledgement of service and the form of defence is set aside.
- c) Service on Advantage General Insurance Company Limited of the claim form, particulars of claim, the prescribed notes to defendant, the form of acknowledgement of service and the form of defence is set aside.
- d) No order as to costs.