[2016] JMCA Civ 61

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 119/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**NICO RICHARDS**	**APPELLANT**
AND	**ROY SPENCER (JAMAICA INTERNATIONAL INSURANCE COMPANY LIMITED INTERVENING)**	**RESPONDENT**

Written submissions filed by Debayo Adedipe for the appellant

Written Submissions filed by David Johnson instructed by Samuda & Johnson for the respondent

20 December 2016

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002)

BROOKS JA

[1] I have read in draft the judgment of my sister Sinclair-Haynes JA. I agree with her reasoning and conclusion and have nothing to add.

SINCLAIR-HAYNES JA

[2] Mr Nico Richards (the appellant) appeals the orders of Master Tai (Acting as she then was) setting aside the orders made by Master Harris (Acting as she then was) which dispensed with personal service of claim form and particulars of claim on Roy Spencer (the respondent), and permitting service to be effected by delivering the said documents to Jamaica International Insurance Company Limited (the intervener).

[3] The appellant was allegedly injured when the motor car in which he was a passenger was struck by a motor truck which was driven by the respondent and owned by Mr Peter Brown (the 2nd Defendant in the court below). The appellant's efforts to personally serve the respondent and Mr Brown with the claim form were unavailing. He consequently applied to the court for an order permitting him to effect service upon the intervener or by way of advertisement in a newspaper. The application was supported by the appellant's affidavit in which he stated his inability to find the respondent and Mr Brown. He asserted that service of the papers on the intervener would cause the documents to come to their attention. He expressed fear that if service was not substituted, the life of the claim form would expire.

[4] Ms Antoinette Campbell, his attorney's secretary, deponed on his behalf. It was her evidence that she received a letter dated 27 February 2014 in response to a letter which she had sent the intervener. That letter was attached to her affidavit. The intervener, by way of that letter, refused to disclose Mr Brown's address and to accept service of the documents. It is illuminating to quote the relevant portion of the response.

> "This serves to advise that we are not minded to accept service on behalf of our insured. In addition, we are not at liberty to disclose his address."

[5] Shirley Johnson, a licensed bailiff, also provided the learned master with an affidavit in which he stated his futile efforts to locate the respondents to serve the documents.

[6] On 13 October 2014, Master Harris (Ag) acceded to the appellant's request and ordered that personal service of the claim form and particulars of claim was dispensed with and that service was to instead be effected on the intervener. Service was so effected on 5 December 2014. The intervener consequently applied to intervene and to set aside Master Harris' order.

The application before Master Tie (Ag)

[7] By way of notice of application for court orders of 19 December 2014, the intervener sought the following orders *inter alia* :

> i. Permission to intervene for the limited purpose of prosecuting the application;
>
> ii. The order of Master Harris to be set aside.

[8] The orders were sought on the following grounds:

> "a) The [respondent] was not a party to the relevant contract of insurance with the [intervener] and the [respondent] at no time provided the [intervener] with his personal details including his residential address.

b) The [intervener] is unaware of the current whereabouts of the [respondent] and will not therefore be in a position to bring the contents of the Claim Form and Particulars of Claim filed in these proceedings to the attention of the [respondent].

c) The [respondent] will be prejudiced should the said Order be permitted to stand as he will be subject to any further Orders and/or decision(s) of this honourable court made in these proceedings.

d) The court's overriding objective will be advanced by the making of the Orders being sought in this Application.

e) The [intervener] has incurred expense in the prosecution of this Application."

[9] The application of 19 December 2014 was supported by the affidavit of Ms Yana Samuels, counsel for the intervener. Ms Samuels averred that there was a contract of insurance between the intervener and Mr Brown. It was also her evidence that the intervener had no personal knowledge about the respondent "which would enable it to bring the contents of the Claim Form and Particulars of Claim to the attention of the [respondent] to enable that [respondent] to take such steps as are necessary to prosecute a Defence to this claim."

[10] According to counsel, the overriding objective would not be advanced if Master Harris' order was permitted to stand. Further, she averred that the intervener has not been authorised by the respondent to appoint an attorney on his behalf or to initiate any action in relation to defending the claim.

[11] Counsel for the appellant, however, pointed out that the intervener could not have made any or much effort to locate the respondent either by itself, or with the assistance of Mr Brown, because of the alacrity with which they indicated their inability to locate him. He pointed out that the papers requesting the information were served on the intervener on 5 December 2014 and their attorneys had responded by 9 December 2014 that they were not aware of the respondent's personal information and would therefore be unable to bring the contents of the claim form and particulars of claim to his attention.

[12] Counsel submitted that the intervener, by its inaction, has frustrated the prospects and likelihood of the documents coming to the attention of the respondent, in a similar way it had frustrated the appellant's efforts to ascertain Mr Brown's address.

[13] The intervener's application found favour with Master Tie (Ag) who granted the orders sought. In so doing she said:

> "10. This test is also evident in a review of rule 5.14.
>
> The question in relation to this matter is whether I can be satisfied that the first defendant was in fact 'able to ascertain the contents of the documents,' or that 'it is likely that he would have been able to do so' through service on the insurance company.
>
> 11. I am not so satisfied. In this particular case, the insurance company has no connection, contractual or otherwise, with the first defendant, the driver of the vehicle. The insurance company indicates that they are ignorant of the particulars of this individual and therefore are unable to bring the documents to the attention of the first defendant. This is unchallenged.

12. Counsel for the respondent contends however that since the first defendant was the servant/agent of the second, if the master is served, it would come to the attention of the servant. He pointed out that the insurance company refused to give the address of the master and hence the claimant had no other option but to make this application.

13. I am not persuaded by this argument. It seems to me that the appropriate subject of such an order ought to be the individual who presumably has knowledge of the whereabouts of the person being sought. Since the second defendant presumably has information as regards the first defendant, an application for substituted service ought properly to be directed towards him. This perhaps could have been facilitated through the insurance company, given the connection between the insurance company and the second defendant.

14. The order which is the subject of this application was imposed on the insurance company, it having been made ex parte, and relates to an individual with whom the insurance company has no connection and has no knowledge of his whereabouts. In my view, it cannot in these circumstances be allowed to stand. This is so even where the insurance company may possibly be able to glean this information from its insured. This is unsatisfactory as their ability to bring the contents of the documents to the attention of the first defendant is dependent on another individual and hence there are clearly unknown variables. As it stands there is no evidence to suggest that service of the documents in issue on the insurance company would result in them coming to the knowledge of the first defendant."

[14] Being dissatisfied, with the learned master's orders, the appellant has consequently challenged her findings of fact and law and has filed notice and grounds of appeal.

"a) Findings of fact;

i) that there was no evidence to suggest that service of the documents on the insurance company would result in the proceedings coming to the knowledge of the [respondent]

b) Findings of law:

i) the implicit finding that Master Harris erred in principle or on the facts in granting the order

ii) The implicit finding that the law required proof that the rules required proof that service of the documents would result in them coming to the knowledge of the [the respondent].

iii) the implicit finding that it was sufficient, for the order of Master Harris to be set aside, that the Insurance company should assert that it had no means of contacting the [respondent], without having indicated the steps taken to establish contact".

3. The Grounds of Appeal are:

i. The learned Master erred in law in interfering with the exercise of discretion by Master Harris.

ii. The learned master erred in law in that she appears to have interpreted the rule to mean that there should be evidence to suggest that service by the means permitted would result in the documents coming to the knowledge of the [respondent] rather than that service by the means permitted would be likely to enable the person to be served to ascertain the contents of the documents (Claim Form and Particulars of Claim).

iii. The learned Master erred in law in failing to recognise that on the evidence before her the Insurance Company knew the address of the [Mr Brown], the principal of the [respondent], and had refused to disclose it even though it knew that the [appellant] was unable to locate the [respondent and Mr Brown].

iv . The learned Master erred in that she accepted the [intervener's] assertion that it could not make contact with the [respondent] in the absence of evidence of any effort (even through the 2nd Defendant) to establish contact with him.

4. Orders Sought

i. That the judgment of Master Tie (Ag.) be set aside

ii. That the order of Master Harris (Ag.) be restored

iii. That the costs of this appeal and the application below be awarded to the Appellant."

Grounds 1 and 2

[15] Was there a likelihood of the contents of the claim form and particulars of claim reaching the respondent's attention, if served on the intervener?

[16] On behalf of the appellant, Mr Adedipe submits that the intervener had, by virtue of its lack of co-operation, sought to frustrate the appellant's effort to personally serve Mr Brown, thereby precluding the appellant from serving the respondent by delivering the documents to his master, Mr Brown. Counsel submitted that there was no evidence

that any effort was made to locate the respondent either by the intervener or Mr Brown.

[17] Master Tie (Ag), counsel submits, ought not to have set aside Master Harris (Ag)'s order simply because she would have arrived at a different conclusion. He submits that she would have had to demonstrate that Master Harris erred in law or misapplied or misinterpreted the facts. He submits that Master Harris was at liberty to make the orders she made as she neither misinterpreted the facts nor misapplied the law. He refers the court to the **British Caribbean Insurance Company Limited v David Barrett, Ivor Leigh Ruddock and Jason Evans** [2014] JMCA App 5 in which Brooks JA relied on **Hadmor Productions v Hamilton** [1982] 1 All ER 1042.

[18] Counsel submits that Master Tie (Ag) was apparently of the view that the appellant was required to demonstrate that the service of the document would result in them coming to the knowledge of the respondent. He directed the court's attention to rule 5.14(2)(b) of the Civil Procedure Rules (CPR) and the case, **Insurance Company of the West Indies v Shelton Allen (Administrator of the Estate of Harland Allen), Mervis Nash, Delan Watson and Nichon Laing** [2011] JMCA Civ 33. He contends that the learned master applied a higher standard than was required by the rules.

Grounds 3 and 4

[19] Counsel for the appellant further submits that no effort was made by the intervener to ascertain the address or whereabouts of the respondent. The intervener,

he submits, has an interest in the outcome of the proceedings. Although the respondent was not its insured, he said he was treated as being authorised to drive the vehicle under the policy of insurance, as without such authorization he could not lawfully have operated Mr Brown's motor vehicle on the road. Counsel referred the court to the Motor Vehicle Insurance (Third-Party Risks) Act and the Road Traffic Act. It was counsel's submission that the intervener was inclined to thwart efforts of service.

[20] Counsel further submits that the intervener was obliged to provide the learned master with evidence as to its efforts, if any, to contact the respondent or to ascertain his whereabouts. The evidence, he submits, makes it plain that no such effort was made as having been served on 5 December 2014, the intervener had determined by 9 December 2014 that it could not bring the papers to the attention of the respondent.

[21] The respondent could not have been lawfully driving the vehicle without the intervener's insurance coverage. It would be unjust and inconsistent with the overriding objective of the CPR for the insurers to "simply shrug off service without attempting to locate the [respondent], albeit not its insured". He says the intervener's attempt to treat the issue in that manner together with its withholding of Mr Brown's address "when it was made plain that efforts at service had failed are clearly calculated to create the false impression that the method of device approved by the master would not make it likely that the content of the claim form and particulars would come to the attention of the [respondent]".

Counsel was of the view that Master Harris (Ag)'s application of the law was correct and it was open to her to conclude that the documents were likely to come to the attention of the respondent.

Submissions on behalf of the respondent and intervener

[22] On behalf of the respondent, counsel submits that Master Harris (Ag) did not have before her critical evidence of the standard required to enable her to properly exercise her discretion in making the order she did. The intervener posits that there was no evidence before her that would indicate that service on it would result in the contents of the document coming to the attention of the respondent. There was therefore insufficient material which could have allowed her to properly exercise her discretion in granting the orders sought.

[23] Counsel for the respondent submits that implicit in Master Tie's (Ag) order is that applications for alternative service required affidavit evidence that the method sought would likely enable the respondent to ascertain the contents of the documents. The crux of the argument advanced on the behalf of the intervener is that the affidavit evidence before Master Harris (Ag) regarding the respondent's ability to ascertain the contents of the documents by that method of service was deficient. Reliance was placed on the case **ICWI v Shelton Allen & Others**.

[24] It is the intervener's further submission that before Master Harris (Ag) was the critical fact that the respondent was not the intervener's insured, therefore, the requirements of rule 5.14 of the CPR were not satisfied. In the circumstances, the

intervener said that there was no material before the learned master which could have enabled her to properly exercise her discretion in favour of the appellant.

[25] It is however submitted that the affidavit evidence of Ms Yana Samuels which was before Master Tie (Ag) stated that the intervener is not aware of the respondent's personal information which was necessary to enable it to bring the contents of the documents to the respondent's attention. The intervener relied on rule 5.14 of the CPR.

The law/discussion

[26] Rule 5.13 of the CPR deals with "Alternative methods of service". It reads:

> "(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."

[27] Rule 5.14(1)(2) of the CPR empowers "the court to make order for service by specified method". It provides that:

> "(1) 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.

(2) An application for an order to serve by a specified method may be made without notice but must be supported by evidence on affidavit-

(a) specifying the method of service proposed; and

(b) showing that that method of service is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim."

[28] The issue is whether the appellant has demonstrated that service of the documents on the intervener was likely to enable the respondent to ascertain the contents of the documents. The following comment of Goddard LJ in the English Court of Appeal case, **Murfin v Ashbridge and Martin** [1941] 1 All ER 231, 235, is instructive:

> "[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."

[29] It is however necessary to indicate that in the later English Court of Appeal case of **Clarke v Vedel** [1979] RTR 26, Stephenson LJ stated that that statement was obiter dictum and "limited to that state of affairs". The question is whether the state of affairs in this matter would permit service on the insurers. The answer lies in whether by such service, there is a likelihood that the respondent will be able to ascertain the contents of the documents.

[30] In **Gurtner v Circuit and Another** [1968] 1 All ER 328 the English Court of Appeal set aside an order permitting substituted service on an insurance company

which had no connection to the defendant. The court found that the affidavit in support of the application 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 come to his knowledge".

[31] By virtue of rule 5.14(2) of the CPR and a reading of the cases, service on the insurer of a defendant is permitted only in circumstances where it is likely that the respondent will be able to ascertain the contents of the documents so as to provide him the opportunity to defend the claim if he so desires. Morrison JA (as he then was) clarified the law in **ICWI v Shelton Allen & Others** . In that case, Morrison JA, was concerned with the application of an insurer to set aside the ex parte order of Master Simmons which, inter alia, dispensed with personal service of the claim on the insured and instead effected service on the intervener (the appellant).

[32] The appellant/intervener challenged among other things, the learned master's finding that service on the appellant/intervener would have enabled the 3rd respondent/defendant to ascertain the contents of the claim form and particulars of claim, and that the failure of the master to consider that the steps which the appellant/intervener had taken to locate the 3rd respondent/defendant had proven futile and therefore the 3rd respondent /defendant would not have been able to ascertain the contents of the claim form and the particulars of claim.

[33] Importantly, in that case, although at the time of the accident in 2005, the contract of insurance was extant, the insurers were however not notified of the accident until after the expiration of the policy and the relationship between the parties had

ceased. In fact, some three and a half years had elapsed before the appellant/intervener was notified. At that point in time, not only had the contractual relationship ceased, but also, the appellant/intervener had no knowledge of his (3rd respondent/defendant's) then whereabouts.

[34] Morrison JA, having examined a number of authorities on the issue said at paragraph [12]:

> "Turning now to the question of service, in **Porter v Freudenberg,** [[1915] 1 KB 857] Lord Reading CJ considered (at page 887) ... 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."

The learned judge of appeal allowed the appeal and set aside the master's order. In so doing he said at paragraph [41]:

> "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 the circumstances."

[35] The circumstances of this case are unlike those of **ICWI v Shelton Allen & Others**. Evidently, Mr Brown is in contact with the intervener. The intervener's

response to the appellant's attorney's request for information concerning both the respondent's and Mr Brown's address/whereabouts makes it apparent that they are at least in contact with Mr Brown but are reluctant to provide his particulars.

[36] Not only has the intervener accepted that there is in existence a contract of insurance between it and Mr Brown, on 16 January 2015 it entered a defence on his behalf in which it was accepted that he was at the material time the owner of the motor truck and the respondent was at the material time its driver. The defence denied that the respondent negligently drove the said motor truck, and it neither denied nor accepted that the appellant was at the material time a passenger in the motor car that collided with Mr Brown's motor truck. The said defence, however, ascribed the cause of the collision to Mr Leonard Delona McLaren, the driver of the motor vehicle that was conveying the appellant at the material time.

[37] Although there is no relationship between the respondent and the intervener, as submitted by Mr Adedipe, the respondent was the servant and or agent of Mr Brown with whom the intervener is obviously in contact, having entered a defence on his behalf. The detailed information pertaining to the accident, on a balance of probabilities, would have been provided by the respondent since there is no evidence that Mr Brown was present at the time of the collision and there is no evidence that the information emanated from another source. It is therefore likely that the intervener will be able to bring the documents to the attention of Mr Brown and the respondent.

[38] Mr Adedipe argued that a contract of insurance against third party risk is mandatory. By virtue of section 4 of The Motor Vehicle Insurance (Third-Party Risks) Act the respondent was authorised to drive Mr Brown's vehicle. Section 4 reads:

> "Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use a motor vehicle on a road, unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Act."

[39] There is no evidence that the policy was "a named driver policy" which would have precluded all other persons except the driver named in the insurance policy from driving the motor vehicle. Furthermore, there is no assertion that Mr Brown has breached the terms of the policy. Mr Brown has accepted that the respondent was his servant or agent.

[40] The arguments advanced by Mr Adedipe in respect of the respondent are sound. Rules 15.13 and 15.14 however both mandate the requirement for 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. No affidavit was filed on behalf of the respondent.

[42] It is also worthy of note that on 19 December 2014, the day the application was filed to set aside Master Harris (Ag)'s order, an acknowledgement of service was filed by the intervener's attorney at law which provided an address for Mr Brown. At that

point in time the appellant would have had knowledge of Mr Brown's address. Service of the claim form and particulars on Mr Brown would more likely have enabled the respondent to ascertain the contents of the documents.

[43] In the absence of evidence on affidavit before Master Tie (Ag) that the method of service sought would have more likely enabled the respondent to ascertain the contents of the documents, this court has no basis to interfere with the exercise of the Master's discretion.

[44] In the circumstances I would dismiss the appeal. Costs are usually the entitlement of the successful party. In these circumstances however, the conduct of the intervener leaves much to be desired. It is clear that they had knowledge of Mr Brown's address but deliberately withheld it contrary to the spirit in which litigation is now conducted. In the circumstances, this a fitting case for the exception to be applied. I would therefore make no order as to costs.

P WILLIAMS JA (AG)

[45] I too have read the draft judgment of my sister Sinclair-Haynes JA and agree with her conclusion. This is an appeal that ought to be dismissed.

BROOKS JA

ORDER

(i) The appeal is dismissed.

(ii) No order as to costs.