

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA**

PARISH COURT CIVIL APPEAL NO COA2021PCCV00010

BETWEEN	ADVANTAGE GENERAL INSURANCE COMPANY LIMITED	APPELLANT
AND	YVETTE GORDON	RESPONDENT

Ms Racquel Dunbar instructed by Dunbar & Co for the appellant

The respondent absent and unrepresented

31 January 2024

Civil procedure – Parish Court – Power to set aside order for substituted service - Order XI, Rule 7c of the Parish Court Rules

ORAL JUDGMENT

V HARRIS JA

[1] This is an appeal against the decision of a judge of the Parish Court (‘the learned judge of the Parish Court’) given on 28 March 2019, refusing to set aside an order for substituted service made on 12 January 2017 by Her Honour Ms A McIntosh, a judge of the Parish Court for the parish of Saint Catherine.

Background

[2] The background facts of this case have been helpfully summarised by learned counsel, Ms Racquel Dunbar, who appears on behalf of the appellant, Advantage General Insurance Company Limited, in her written and oral submissions, which we gratefully adopt.

[3] These proceedings arise from a motor vehicle accident that occurred on 13 June 2011, in which the respondent, Ms Yvette Gordon, alleged that she was injured. As a result, on 7 April 2016, she initiated proceedings in the Saint Catherine Parish Court against the defendant, Mr Vernon Escoe, claiming damages for negligence. The respondent could not locate Mr Escoe, so she was unsuccessful in personally serving him with the summons to appear to the plaint and particulars of claim. Consequently, on 12 January 2017, the respondent sought and obtained the court's permission to dispense with personal service and an order for the substituted service of the relevant documents on the appellant, Mr Escoe's insurers at the time of the alleged motor vehicle accident.

[4] The appellant was served with the formal order for substituted service on or around 27 March 2017, which dispensed with the requisite personal service on Mr Escoe and instead granted permission to have service effected on the appellant. By the time the appellant was served with the formal order, Mr Escoe's insurance contract had expired in January 2012, and he was no longer their insured. Nonetheless, the appellant took steps to locate Mr Escoe at the residential address it had on file and by telephone. Those efforts proved futile. As such, the appellant filed a notice of application to set aside the order for substituted service on 26 January 2018. On 28 March 2019, the learned judge of the Parish Court refused that application, having found that she lacked the jurisdiction to do so.

[5] Dissatisfied with that decision, the appellant filed its notice and grounds of appeal on 4 April 2019, which outlined four grounds of appeal. The main issue on appeal is whether the learned judge of the Parish Court erred when she concluded that she had no jurisdiction to set aside the order for substituted service.

[6] In her oral and written submissions before us, Ms Dunbar contended that the purpose of the order for substituted service was to bring the proceedings to the attention of Mr Escoe, which the appellant was unable to do because it had no connection with him after 25 January 2012, which was over five years at the time the appellant was served with the order for substituted service. She contended further that the evidence presented

by the appellant at the application to set aside the order for substituted service was similar to the evidence that the respondent relied on to obtain the order, except that the appellant also tried to contact Mr Escoe by making several calls to the telephone number he had provided to them, which went unanswered and directly to voicemail.

[7] Contrary to the decision of the learned judge of the Parish Court, counsel has submitted that, by virtue of Order XI, Rule 7c of the Parish Court Rules ('PCR'), she had the jurisdiction to set aside the order for substituted service. Counsel further submitted that the learned judge of the Parish Court's reliance on the case of **Metalee Thomas v The Asset Recovery Agency** [2010] JMCA Civ 6 ('**Metalee Thomas**') to decline jurisdiction to set aside the order was flawed as that case was irrelevant to the application she was considering.

Discussion and disposal

[8] Order XI, Rule 7c, which falls under the heading "INTERLOCUTORY AND INTERIM ORDERS AND PROCEEDINGS", provides:

"(c) The Judge upon the hearing or adjourned hearing of the application may make an order absolute in the first instance, or to be absolute at any time to be ordered by him, unless cause be shown to the contrary, or may make such other order, or give such directions as may be just."

[9] It is clear to us, as Ms Dunbar submitted, that Order XI of the PCR, which makes provision for interlocutory and interim orders and procedures, would be relevant. We also agree with counsel that applications for and setting aside a substituted service order are interlocutory in nature since they address administrative aspects of a claim and are not determinative of the matter before the court. We find favour with her submissions that Order XI, Rule 7c is wide enough to allow a judge of the Parish Court, when considering an application to set aside an order for substituted service, to "make such other order, or give such directions as may be just".

[10] In the case of **Insurance Company of the West Indies Ltd v Shelton Allen and others** [2011] JMCA Civ 33 (relied on by the appellant), at para. [12], Morrison JA (as he then was) cited with approval the dictum of Lord Reading CJ in **Porter v Freudenberg** [1915] 1 KB 857. At pages 887 – 888, Lord Reading CJ stated that:

“[a Defendant] is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him. ... In order that substituted service may 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 to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted. ...”

[11] In the light of these authorities, it is difficult to resist Ms Dunbar’s submission, which is worth setting out in full, that “[t]he whole purpose of granting an Order for Substituted Service is to bring the suit to the attention of the Defendant thus giving him the opportunity to [d]efend himself against the claim being made by the Plaintiff; this is the Defendant’s right under Natural Justice and [t]he Constitution. It is palpably clear that the refusal to [s]et [a]side the order for Substituted Service robs the Defendant [Mr Escoe] of his Natural Justice rights as the matter would be proceeding against him without his knowledge and without the opportunity to [d]efend himself against the Claim”.

[12] To that sound argument, we would simply add that, in any event, given that the appellant had presented compelling evidence of its inability to notify Mr Escoe about the proceedings instituted against him, the “just” order or direction would have been to set aside the substituted service order. We also agree with Ms Dunbar that the learned judge of the Parish Court’s reliance on **Metalee Thomas** to decline jurisdiction in this matter was misplaced because the issue, in that case, was whether section 190 of the Judicature (Parish Courts) Act, which gives a judge of the Parish Court the power to amend defects and errors in any proceedings before the court, was utilised correctly when the amendment resulted in a new cause of action.

[13] The refusal of the learned judge of the Parish Court to set aside the order for substituted service was an exercise of her discretion. It is now well settled that an

appellate court will only set aside the exercise of a discretion by a judge on an interlocutory application "...on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardless of his duty to act judicially could have reached it' " (per Morrison JA at para. [20] in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1).

[14] In our judgment, the learned judge of the Parish Court erred in law when she found that she lacked the jurisdiction to set aside the order for substituted service as she was so empowered by Order XI, Rule 7c. Therefore, the court will intervene and set aside her decision, having found that there is merit in the appeal.

[15] In the notice and grounds of appeal, one of the orders sought by the appellant was that if the appeal were allowed, its application be remitted to the court below to be considered afresh. However, in oral submissions before us, Ms Dunbar requested that the order for substituted service that was made on 12 January 2017 by Her Honour Ms A McIntosh be set aside in accordance with the court's power under rule 2.14(b)(b) of the Court of Appeal Rules ('CAR'). That rule empowers the court, in relation to civil appeals, to "give any judgment or make any order which, in its opinion, ought to have been made by the court below".

[16] As indicated previously, it is our opinion that the appellant's application to set aside the order for substituted service ought to have been granted in the court below. We are, therefore, prepared to exercise our powers under rule 2.14(b)(b) of CAR for this reason, as well as on the basis of the length of time that has elapsed between the refusal of the application to set aside the order for substituted service and the hearing of the appeal (over four years). This delay is primarily due to the court's efforts to ensure that the respondent, who has been unrepresented in the appeal, complied with court orders and attended the hearings.

[17] For the preceding reasons, the order of the court is as follows:

1. The appeal is allowed.
2. The order of the learned judge of the Parish Court, made on 28 March 2019 refusing to set aside the order for substituted service made on 12 January 2017, is set aside.
3. The order for substituted service, made on 12 January 2017 by Her Honour Ms A McIntosh, is hereby set aside.
4. No order as to costs.